CHAPTER ONE: CRIMINAL LAW

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CHAPTER ONE: CRIMINAL LAW

This Manual is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. Nothing herein creates a solicitor-client relationship. All information in this Manual is of a general and summary nature that is subject to exceptions, different interpretations of the law by courts, and changes to the law from time to time. LSLAP and all persons involved in writing and editing this Manual provide no representations or warranties whatsoever as to the accuracy of, and disclaim all liability and responsibility for, the contents of this Manual. **Persons reading this Manual should always seek independent legal advice particular to their circumstances.**

I. INTRODUCTION

This chapter provides a reference for self-represented litigants and law students to assist and advise them through each step of the criminal justice process. It highlights the procedures and issues self-represented litigants and law students commonly face in representing themselves or clients in criminal proceedings, sets out the relevant substantive law to assist students in preparing for trial, and includes practice recommendations for students and self-represented litigants.

II. GOVERNING LEGISLATION AND RESOURCES

A. Resources

1. Annotated Criminal Codes:

- Edward Greenspan, Marc Rosenberg, & Marie Henein, eds, *Martin's Annual Criminal Code*, 2020 ed (Toronto: Thomson Reuters, 2020).
- Alan D. Gold, *The Practitioners Criminal Code, 2020 ed (Toronto: LexisNexis Canada, 2020).*
- The Honourable Mr. Justice David Watt, The Honourable Madam Justice Michelle Fuerst, *Tremeear's Annotated Criminal Code*, 2020 ed (Toronto: Thomson Reuters, 2020).

NOTE: All criminal lawyers carry around one of the three leading annotated criminal codes. The most commonly used is *Martin's*. When reviewing any case, the annotations on the section a client is charged with provide a good place to start regarding identifying the elements of the offence.

2. Other Criminal Law Resources:

- Eugene E Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed (Toronto: Canada Law Book, 1988).
- Peter K McWilliams & S Casey Hill, *McWilliam's Canadian Criminal Evidence*, 4th ed (Toronto: Canada Law Book, 2003).
- David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998).
- R Paul Nadin-Davis & Clarey B Sproule, eds, *Canadian Sentencing Digest Quantum Service* (Toronto: Carswell, 1988) (also available on e-carswell).
- Francis Lewis Wellman, *Art of Cross-Examination With the Cross-Examinations of Important Witnesses in Some Celebrated Cases* (New York: Collier Books, 1903).
- Earl J Levy, *Examination of Witnesses in Criminal Cases,* 3d ed (Toronto: Carswell, 1994).
- Thomas A Mauet, Donald G Casswell, & Gordon P MacDonald, *Fundamentals of Trial Techniques* (Toronto: Little, Brown, 1995).

- Christopher Bentley, *Criminal Practice Manual: a Practical Guide to Handling Criminal Cases* (Scarborough, Ont: Carswell, 2000).

3. *Relevant Statutes:*

- *Criminal Code,* RSC, 1985, c C-46.
- *Controlled Drugs and Substances Act*, SC 1996, c 19 (if drug offence).
- *Canada Evidence Act*, RSC, 1985, c C-5.
- *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 (particularly ss 7 – 14, 24 (1) and (2)).
- *Identification of Criminals Act*, RSC, 1985, c I-1.
- *DNA Identification Act*, SC 1998, c 37.

4. *Legal Aid*

The Legal Services Society of B.C. (LSS) is the only source of criminal legal aid in British Columbia. Legal Aid's purpose is to provide free representation for financially eligible accused persons (low-income individuals), who are charged with certain offences. The Society will provide a retainer to a lawyer chosen by the eligible client in private practice who will provide legal assistance on a contract basis. The Society will also assist the eligible applicant in finding a lawyer if needed.

A wide range of booklets and pamphlets covering various legal problems and legal rights are also available from LSS offices. This material is free.

The client should be advised to contact Legal Aid directly at (604) 408-2172. See **Chapter 23: Referrals**, or the blue pages of the phone book, for more information.

a) *Financial Eligibility*

The Legal Services Society will grant a letter of referral to applicants who meet the Society's financial eligibility requirements. These can be found at www.lss.bc.ca/legal_aid/doIQualifyRepresentation.php.

There is some flexibility in the requirements, subject to the discretion of the person assessing the application. Clients will be required to fill out a means test indicating income, expenses, education, and employment history.

b) *Eligible Offences and Conditions*

Legal aid lawyers may be able to represent an accused person in their criminal case if, after conviction (or a guilty plea) the accused would:

a) be sentenced to a period of jail (including a conditional sentence);
b) lose their way of earning an income; or
c) face an immigration proceeding that could lead to deportation from Canada.

Legal aid lawyer may also represent an accused person if the accused person:

a) has a physical condition or disability or mental or emotional illness that makes it impossible for the accused to represent themselves, or
b) are indigenous and the case affects their ability to follow a traditional livelihood of hunting and fishing.

c) *Reviewing a Decision*

An accused who has been rejected can have the decision reviewed where circumstances warrant it. Requests for reviews must be in writing, must set out the reasons for disagreeing with the decision, and must include copies of supporting documentation. LSS does not consider any requests received 30 or more days from the date of the intake legal assistant's decision.

5. *Vancouver Lawyer Referral Service*

The accused may call (604) 687-3221 or 1-800-663-1919 (for those outside the Lower Mainland) to reach the service, where an operator will provide the name of a lawyer who practices criminal law. The client should then call the lawyer to make an appointment. There is no fee for the first half-hour session, and the client will have to negotiate the fee for subsequent sessions at their first meeting with the lawyer. See **Chapter 23: Referrals** for more information.

6. *Duty Counsel*

If the accused does not have a lawyer (either retained privately or through Legal Aid) Duty Counsel (lawyers paid by the government) are there to assist unrepresented people (whether in custody or out of custody) by providing them with basic legal information and advice, and to assist them in conducting basic court appearances. Duty Counsel is often the first lawyer to give legal advice to people in custody. As Duty Counsel is there to assist anyone on a given day, they cannot conduct trials or other lengthy matters. Duty counsel can help the accused by:

- giving advice about the charges and court procedures;
  conducting a bail hearing;
- entering a guilty plea and providing background information about the accused for the purposes of sentencing; and
- talking to the accused about possible ways of resolving the file such as through diversion.

III. ETIQUETTE

A. *Courtroom Procedure for Self-Represented Litigants*

When an accused attends court for a matter, they should check the court lists to confirm which courtroom the matter is to be heard in. If the court is not sitting at the time, the accused should attempt to seek out the Crown Counsel who has conduct of the matter and identify themselves.

In order to get their matter called, the self-represented accused person should indicate to Crown Counsel or the Crown assistant that they are present, self-represented, and ready to proceed. Crown Counsel will proceed with the shortest matters first; priority will also be given to matters for which the accused **and their counsel** are present. Do not interrupt Crown Counsel when they are addressing a matter.

When the Judge enters or exits the court, the accused should stand. If the court is sitting, the accused should enter the courtroom, and be seated at the chairs located behind the bar.

When the matter is called, the accused should rise and approach the counsel's table. They should stand on the other side of the podium from the Crown. The rule of thumb is that Crown is seated next to the witness box while the defence and the accused are seated furthest away. In order to get

the matter called, the accused should indicate to the sheriff or the Crown that they are ready to proceed.

NOTE: Provincial Court Judges wear robes and are addressed as "Your Honour" in court while JPs wear suits or other clothing, and are addressed as "Your Worship."

1. Interacting with Crown

When interacting with the Crown (or anyone else for that matter), the accused should always be pleasant and polite. There are times when the accused needs to be more assertive but this should be done in a tactful way. The accused should always respect the Crown, even when pointing out errors.

2. Courtroom Demeanour and Etiquette

- Be well-groomed and well-dressed;
- Always be polite to everyone in the courtroom;
- Never mislead the court;
- Be punctual. Do not waste the court's time;
- Address the court in a loud clear voice. Most microphones in the courtrooms are only; for recording and not for amplification purposes;
- Stand when the judge enters or leaves the courtroom;
- Stand when addressing the Court, being addressed by the Court, objecting and responding to objections. Stand when (or if) you are being sentenced or convicted;
- Sit when Crown counsel is speaking to the court or interjects to make an objection;
- Stand on the other side of the podium from Crown Counsel and furthest away from the witness box;
- Be well prepared. Know the factual basis of your file, the applicable law and the relevant procedural rules. Part of being well prepared means being able to answer questions from the court;
- Be respectful in your comments. In your dealings with the Court adopt a formal approach which reflects courtesy and respect for the authority of the court. Let the court know what you are doing with phrases such as "with your Honour's leave I would like to approach the witness to show him his statement";
- Do not interrupt the judge. Listen to what the judge says;
- Pause briefly to consider your words and then respond;
- Address all remarks to Crown Counsel through the judge; and
- Do not quarrel with Crown Counsel, witnesses or the Court; and
- **Slow down.** The judge will likely be taking notes, if you see that the judge is not looking at you and writing things down pause and wait.

IV. THE CHARGE

A. Arrest

There may be a *Charter* issue here. See **Section IX: Charter Issues** with respect to arbitrary detention and unlawful arrest.

B. Informing an Accused of the Charge and Compelling Appearance

A person may learn that they are accused of committing a criminal offence in one of several ways. They may:

a) receive an appearance notice or a promise to appear from the police;
b) receive a summons (in the mail or personally); or
c) be arrested and kept in custody until they are brought before a judge or Justice of the Peace (JP).

An accused person will have received an appearance notice or a summons requiring them to attend court. Such an appearance notice indicates that the police officer involved in the case believes that they have a case against an accused. After an appearance notice is issued, the police officer forwards a package to the Crown for charge approval. Usually, such charges are approved by the Crown prior to the first appearance in court. By the time an accused attends court, an Information will likely have been sworn. The accused person **must** attend court on the date required by the appearance notice or summons. If they fail to attend court, a warrant for the accused person's arrest will usually be issued.

1. Appearance Notice

The attending officers at the scene of an alleged summary conviction or hybrid offence do not always have cause to arrest the suspect (see Section 495(2) *Criminal Code*). When there is no cause to arrest the suspect but the police still intend to forward charges for an offence, they will serve an appearance notice on the accused compelling them to appear at a future date and time at a courthouse to face potential charges (see *Criminal Code*, s. 496)

NOTE: An accused person should note that they **MUST** attend court as directed in the Appearance Notice, but that sometimes the accused person will not be on the court list as since the police might not have forwarded the charges, the Crown might not approve charges or there may be a delay in processing the charges. If an accused person does not see their name on the court list on the appearance date, they should go to the court registry to show them the Appearance Notice and ask if they are on any court list.

2. Promise to Appear

If an accused is arrested, then the police must decide whether to: a) keep the accused in custody for the Crown to seek detention; or b) exercise the power to release the accused. A promise to appear is a binding agreement whereby the accused person promises to attend court on a later date and abide by the conditions the police impose, and, in exchange, the police will release the accused from custody.

3. Summons

A summons is a written order by a justice in prescribed form requiring the accused to appear before a justice at a particular time and place (see *Criminal Code*, s 509).

NOTE: A summons should not be disregarded because of a misspelling of the accused's name, nor because of minor irregularities or mistakes.

The summons may be served by a peace officer personally, or it may arrive by mail. It can also be served, when the accused cannot conveniently be found, to a person living in the accused's residence who appears to be at least 16 years old (see *Criminal Code*, s 509(2)).

4. Judicial Interim Release (Bail)

A person who has been charged with an offence may be arrested by the police and not be released on a promise to appear. This can occur if the police are seeking conditions on the promise to appear which the accused does not agree to or if the police determine, in their opinion, that the accused ought not to be released from custody.

A detained person must be brought before either a judge or a justice of the peace without unreasonable delay or where a justice is not available within a period of 24 hours after the person has been arrested, the person shall be taken before a Justice as soon as possible (see *Criminal Code*, s 503). When the accused is brought before a Judge or a justice of the peace and the Crown is seeking the continued detention of the accused the onus is on the Crown to show cause as to why the continued detention of the accused is necessary (see *Criminal Code*, s 515(10)), except for the offences listed under section 515(6) of the *Criminal Code*. Section 515(6) includes very serious offences such as murder and treason and less serious matters where special considerations apply such as when violence was allegedly used against an intimate partner and the accused has been previously convicted of an offence. For these offences, the onus is reversed and it is on the accused to show why they can be safely released on bail.

There are three ways in which the detention of a person charged with a criminal offence can be justified under section 515(10) of the *Criminal Code*. In the case law, these are usually referred to as:

1. Primary—to ensure attendance in court (a possible flight risk).

2. Secondary—bail can be denied for the protection and safety of the public, including a substantial likelihood the person will commit a criminal offence or interfere with the administration of justice.

3. Tertiary—the detention is necessary to maintain confidence in the administration of justice (includes seriousness of the offence charged and strength of the Crown's case).

Often during the show-cause hearing, the focus becomes the conditions an accused person can be released upon and the adequacy of the accused's bail plan. This is particularly the case where an accused by virtue of section 515(6) of the *Criminal Code* has the onus of establishing that the court can safely release them from custody. A release plan may include sureties, cash deposit or restrictive conditions such as a curfew or an area restriction. Sureties can only be imposed when less onerous forms of release are inadequate. The Crown will usually have specific concerns about an accused's behaviour. Previously, the law required conditions of release to be as minimally restrictive on a person's freedom as possible while still addressing the cause for concern.

Currently, over 50% of inmates in provincial remand centres consist of individuals detained prior to their trial. Pre-trial detention can last as long as 24 months, inmates are held in crowded conditions, and Indigenous individuals are overrepresented among them. Furthermore, detention can hurt an accused's ability to provide a full defence and may lead to induced guilty pleas. Therefore, the bail decision can be life-changing to an accused individual. However, because of the temporary nature of bail and the length of time the court process takes, bail decisions are rarely appealed.

In response to these problems, the Supreme Court of Canada modified the test for judicial interim release in *R v Antic*, 2017 SCC 27 and *R v Myers*, 2019 SCC 18 [*Myers*]. The court emphasized that the accused should be released at the earliest reasonable opportunity and on the least onerous grounds. The test in *Myers* requires a bail plan that reduces the risk of the accused re-offending to a reasonable level. There is no longer any requirement to address the risk completely. Furthermore, the Court in *Myers* allowed for

accused to be released from detention in order to receive treatment for mental health conditions and issues with substance abuse; this may help reduce the rate of re-offence and help defence counsel achieve better sentences for these accused.

Bill C-75, An Act to amend the *Criminal Code*, the *Youth Criminal Justice Act* and other Acts and to make consequential amendments to other Acts, 42nd Parliament, 2019, cl 210 (received Royal Assent on June 21, 2019, coming into force on December 18, 2019) [Bill C-75] amended the *Criminal Code* to add sections 493.1 and 493.2 regarding releasing accused that are in custody. In short, the amendment emphasized the rulings in *R v Antic* and *R v Myers*, stating that peace officers, justices, and judges should place the highest priority on releasing an accused at the earliest possible opportunity and on the least onerous grounds. Furthermore, section 493.2 obligates peace officers, justices, and judges to give particular attention to the circumstances of aboriginal accused and those accused who belong to vulnerable populations that are overrepresented in the criminal justice system and are disadvantaged in obtaining release.

5. Warrant in the First Instance

A warrant for arrest may be issued when an accused fails to appear for a summons or a Justice decides that it is in the public interest to issue a warrant. Some common situations where this arises are as follows:

- An appearance notice or summons was issued for the accused to attend court, and they did not attend court at the appropriate date and time;
- The accused is avoiding service or is unable to be located;
- The accused was never actually arrested for the offence; or
- The Crown cancels a promise to appear and seeks a warrant because they are seeking the accused’s detention or conditions on the release of the accused (see *Criminal Code*, s 512).

6. Fingerprinting and Photographing

A person in lawful custody for an indictable offence (or a hybrid offence where the Crown has yet to elect) may be fingerprinted and photographed. A person may be required to submit to being fingerprinted and photographed under the *Identification of Criminals Act*, R.SC 1985, c I-1.

If the Crown is proceeding summarily, they have no power to require fingerprints. If the accused attends court prior to the fingerprinting date, the accused can ask the Crown to elect in court how they are proceeding. Once Crown has stated on record that it is proceeding summarily, the accused will not be required to attend fingerprinting. If the accused has already been fingerprinted and the Crown is proceeding summarily, the accused can apply to the police force who collected the fingerprints to have those fingerprints destroyed.

7. Varying Conditions of Interim Release (Bail Variation)

Sometimes an accused is unhappy with one or more of their bail conditions and wants those conditions changed. Bail conditions can be changed in Provincial Court with consent of the Crown. However, if a trial has already begun, the judge can make the variation without Crown consent. If there is no consent by the Crown, it becomes a Supreme Court matter (see below). In order to convince the Crown to vary bail conditions, it will be necessary to convince the Crown Counsel that a less restrictive condition is sufficient to meet the concern addressed by the condition **or** that the condition is no longer necessary. For example, on a spousal assault file, an accused is usually released on a condition that they do not contact their spouse. It is not uncommon

that following an incident the couple will want to contact each other. In these circumstances, the Crown will often interview the complainant in order to determine what if any no-contact conditions remain necessary for the complainant.

Should Crown not consent to the proposed bail review an accused can bring an application to review the bail conditions before a judge of the BC Supreme Court under section 520 of the *Criminal Code*. Review procedures in the Supreme Court are difficult for a layperson to navigate through and anyone conducting such a review is advised to retain a lawyer.

8. Charge Approval by Crown Counsel

In BC, charge approval is conducted by the Crown Counsel, not by the police. On occasion, an accused person will have a compelled court appearance or will be arrested for an offence by the police, but when the Crown Counsel reviews the charges being recommended by the police, they may conclude that it does not meet their Charge Approval standard.

The criteria used by Provincial Crown to determine whether to proceed with a charge are:

1. whether there is a substantial likelihood of conviction; and
2. whether it is in the public interest to proceed.

More information regarding charge approval is available online at http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf in the Crown Counsel Policy Manual (Policy Code CHA 1).

C. Appearance Requirements

For summary offences, anyone can appear as agent for the accused if the accused is unable to attend court.

For indictable offences, the self-represented accused must appear in person.

An accused person who fails to attend court without lawful excuse as required under a recognizance, appearance notice, promise to appear, or summons, may be charged with an offence (see *Criminal Code*, s 145).

D. Initial Appearance(s)

Matters are generally set for the Initial Appearance Room if the accused has not previously appeared in court for this matter, has not yet obtained counsel or has not set a date for trial or guilty plea. An accused can have multiple Initial Appearances. If the accused person has not yet made their first appearance in court, they should be instructed to attend their Initial Appearance and obtain the particulars and Initial Sentencing Position from Crown.

NOTE: If the accused does not have counsel and wants to obtain counsel, an adjournment will likely be granted. The case will be adjourned until the accused has had an opportunity to discuss the case with counsel. If the accused is self-represented, they should consult duty counsel.

1. Procedure at Initial Appearance

At an Initial Appearance, the accused comes forward; the prosecutor indicates the nature of the offence without reading the Information and a Justice of the Peace will make inquiries

as to whether the accused has legal counsel and the intentions of the accused regarding the case. **An accused should not enter a plea at an initial appearance. (One cannot enter a guilty plea in front of a Justice of the Peace.)** There will often be many appearances before a plea or trial is set.

Before the accused is asked to decide how they will plead, counsel should ensure that the accused fully understands their legal rights, the consequences of a guilty plea, and the Crown's burden of proof to prove all elements of the offence beyond a reasonable doubt. Also, counsel should discuss any possible defences, mitigating factors, and any possibility of being found guilty for lesser included offences if guilt is not established for the original charge.

E. Obtaining Particulars

If the accused does not already have a copy of the particulars, they should request the particulars at the next appearance date. Particulars are usually given to the accused on the first appearance.

F. Review the Particulars

The particulars should include the following documents:

1. The Information

The "Information" contains the specifics of the charge, including the date of the alleged offence, the name of the accused, and the specific section of the statute allegedly contravened. It guides the entire legal process faced by the accused. See **Appendix B** for a sample Information.

a) Review the Information

The Information should be reviewed to determine what offence the accused has been charged with. Review the appropriate *Criminal Code* provisions in an annotated *Criminal Code* which often provides quick references to common issues that arise from prosecution under that section of the *Criminal Code.*

One should review all aspects of the Information to ensure that it has been laid properly. Particularly, ensure that the Information has been laid within six months of the alleged offence on summary conviction offences (this becomes twelve months after December 18, 2019). Also, ensure that the date of the alleged offence and the names of the accused and complainant are correct.

b) Content of the Information

The Information must contain sufficient allegations to indicate that the named person committed an offence. It may contain "counts" charging the accused with separate offences. It must contain sufficient details of the circumstances of the offence(s) to enable the accused to make full answer and defence to the charge (ss 581(1) and (2) of the *Criminal Code*). If the Information does not contain sufficient particularisation to allow full answer and defence to the charge, an application may be brought to the court to particularise the Information (see *Criminal Code*, s 587). If the Information does not adequately state the charge or contains a very unclear description of the alleged offence, then a motion can be made to quash or strike down the Information. However, as noted below, this

process is rarely used because the courts will generally allow the Crown Counsel to amend the Information instead of ordering it to be quashed.

c) *Obtaining the Information*

If the Information is not contained within the particulars package, a copy may be obtained from the court registry or Crown Counsel's office any time after it is laid.

d) *Striking Down an Information*

Provisions exist for a motion to be made to quash the Information (or a count therein) before the plea, or with leave of the court, afterwards (see *Criminal Code*, s 601(1)). Although this is almost never done, some situations in which an Information might be struck down are if it does not adequately state the charge, does not include the date of the offence, or contains an unclear description of the circumstances of the alleged offence. To remedy the defect, the court may quash the Information or order an amendment. Amendment powers are considerable, and the Information may be amended at any time during the trial so long as the accused is not prejudiced or misled. The court will generally amend an Information if the defects are in form only. *R v Stewart* (1979), 46 CCC (2d) 97 (BCCA) makes it clear that courts tend to focus on substantial wrongs, not mere technicalities. There are generous provisions in the *Criminal Code* that allow technical defects in form and style to be disregarded (ss 581(2) and (3), and s 601(3)).

Challenging an Information
Although the court rarely strikes down an Information due to technical errors, at trial Crown must prove the offence as alleged in the Information. They must prove beyond a reasonable doubt the identity of the accused, the location of the crime (British Columbia), the physical criminal act, and a guilty mind. Despite the very broad power to amend an Information to cure technical defects prior to the end of the trial, amendments after the defence/accused has closed its case are less likely to be granted. This is because once defence/accused has closed its case – based on a flawed Information, and with a view to a closing argument that Crown has not proven the Information as alleged – the accused is prejudiced by any subsequent amendment of the Information. Hence a possible strategy on a case where there is an error in the Information is to wait out the Crown's case, close the defence case, and then argue reasonable doubt on the offence as alleged.

e) *If the Information is Struck Down*

If there has been no adjudication of the case on its merits, the prosecutor may lay a new Information. The prosecutor must do so within the limitation period.

f) *Limitation Periods and the Information*

Section 786 of the *Criminal Code* states that no proceedings may be initiated in summary conviction offences after six months have elapsed from the time of the alleged offence, except on agreement of the prosecution and the defendant (twelve months after December 18, 2019). The date on which proceedings commence is when the Information is laid, therefore the Information must be laid within limitation period. Indictable offences have no specific statutory limitation period.

2. *The Initial Sentencing Position (ISP)*

The Crown's Initial Sentencing Position should be reviewed. This will sometimes

indicate whether Crown is seeking jail time, or it can specify the sentence the Crown is seeking. A request for a more detailed initial sentencing position can be made. **See Appendix A for a sample ISP.**

3. Report to Crown Counsel (RTCC)

The Report to Crown Counsel (RTCC) sets out the police officer's narrative and summary of the case. It usually has a summary of the witness statements as well as what the police officer(s) themselves observed, and police actions taken in relation to the investigation of the alleged crime. It should also state whether the accused has a prior criminal record.

What should usually be in the RTCC:

a) Summary of Police Notes;
b) Summary of Witness Statements;
c) Description of any Photographs or available Surveillance;
d) Description of any expert evidence the police have requested;
e) Criminal Record; and
f) Summary of other important evidence collected by police in the investigation.

When the accused receives the RTCC with the Particulars, the RTCC should be reviewed to ensure full disclosure has been made from the investigation. If the RTCC mentions an audio statement that was taken, that audio and perhaps a transcript of the audio should be included in the disclosure. In addition, ensure that there is a narrative and corresponding personal notes from each police officer mentioned in the RTCC and that any other evidence mentioned in the RTCC has been provided in the particulars. If something is missing from the file, make a disclosure request to the Crown.

4. Release Conditions (Contained Within the Bail Document)

These should be obtained from the court registry if the accused has misplaced their copy of their release documents. The accused should review the release conditions and ensure that they understand all of the conditions and the importance of abiding by the conditions of release regardless of how unfair or difficult those conditions are to abide by. In a case of domestic assault, there will almost always be a no-contact conditions and area restrictions. The accused may encounter situations where the complainant and the accused wish for contact and there is a no-contact bail condition (see above section for Bail Variations).

If the accused has a good reason to have their release conditions varied, Crown Counsel should be contacted. The reason for the proposed variation should be explained to the Crown Counsel. It is important to make a convincing argument for the proposed variation directly to Crown Counsel, as an application cannot be made to vary bail conditions in Provincial Court without the Crown's consent. In practice, Crown Counsel only consents to hearing applications for bail variation in Provincial Court when they agree with the proposed variations. Variation applications without Crown Counsel's consent are made at the BC Supreme Court.

The accused should keep in mind that if there is a no-contact or an area restriction, they **must** remember that contacting the complainant or going to that location is a criminal offence.

G. Assessing the Strength of the Case

Once the accused has received the particulars and knows the evidence that Crown would seek to lead in its case to prove the accused's guilt, it is important to critically assess the strength of the Crown's case and consider any challenges which can be made to the case. At this stage, the accused/defence should be in a position to review the elements of the offence and be able to concisely summarize the key evidence that the Crown Counsel will seek to adduce at trial to prove each element of the offence.

1. *Things to Consider When Assessing the Crown's Evidence*

For each key piece of evidence that the Crown needs to establish its case, consider the following:

a) *Is the evidence direct or circumstantial?*

If the evidence is circumstantial, is there an innocent explanation for the totality of circumstances?

b) *Is the Evidence Testimonial?*

For testimonial evidence, consider the reliability and credibility of the witness. Consider whether there is a good reason to suspect that the witness is mistaken (attacking reliability) or lying (credibility).

c) *Is the Evidence Physical Evidence?*

If the evidence is physical evidence that has been collected by the police, consider the chain of custody of the item and whether there has been a break in the continuity of custody.

d) *Is There a Possible Charter Challenge?*

Consider whether there is a possible Charter challenge that could result in the exclusion of evidence. Charter challenges include challenges to police searches, arrests, and confessions (see **Section IX** for information on *Charter* challenges).

e) *Are There Any Other Exclusion Rules?*

Consider whether there are other exclusionary rules that could be used to exclude any key pieces of evidence that the Crown needs to prove its case. Generally, if a piece of evidence has more prejudicial effects than probative value, the evidence will be excluded (*R v. Seaboyer* [1991] 2 SCR 577).

V. SUBSTANTIVE LAW RE: OFFENCES

A. *Provincial Offences*

All offences created by provincial statute are prosecuted as summary conviction offences. Examples of provincial offences are those created by the *Motor Vehicle Act*, RSBC 1996, c 318, *Liquor Control and Licensing Act*, SBC 2015, c 19, *Family Law Act*, SBC 2011, c 25, *Employment Standards Act*, RSBC 1996, c 113, and the *Residential Tenancy Act*, SBC 2002, c 78. Other summary conviction offences are established by municipal bylaws (i.e., parking violations and lodging-house violations). Note that *Criminal Code* offences, though stemming from a federal statute, are prosecuted provincially.

B. *Federal Offences*

A federal statute may create an offence that is an indictable offence only, or is punishable on summary conviction only, or is either indictable or summary (i.e., hybrid) depending on the Crown's approach. Examples of federal offences are found in the *Criminal Code*, the *Controlled Drugs and Substances Act*, the *Income Tax Act*, RSC 1985 (5th Supp), c 1 of the *Customs Act*, RSC 1985, c 1 (2nd Supp), and the *Fisheries Act,* RSC 1985, c F-14. Although the federal government regulates *Criminal Code* offences, the provincial Attorney General administers the law in this area. This distinction is important in determining who will prosecute the offence. Federal Crown prosecutors handle drug, tax-related, and fisheries offences.

C. *Penalties and Punishment*

a) *Summary Offences*

Provincial Offences

The *Offence Act*, RSBC 1996, c 338 provides that offences created under a provincial enactment (often called "regulatory offences") are punishable by summary conviction (s 2). The Act establishes the maximum penalties that may be imposed upon conviction for a provincial summary offence. These provisions apply except where a provincial statute creating an offence provides for some other penalty. Under the Act, the maximum fine that may generally be imposed is $2,000; the maximum term of imprisonment is six months. The court may impose either or both of these penalties (s 4).

The procedure followed for laying an Information (or charge), issuing a summons, appearing for trial, etc. is set out in the *Offence Act*. However, the procedure to be followed may be altered by the provincial statute that creates the specific offence.

Where the *Offence Act* is silent concerning a procedural matter, the *Criminal Code* provisions governing federal summary proceedings apply. There is little difference between the procedures set out in the *Offence Act* and the *Criminal Code* provisions for summary proceedings.

***Criminal Code* and Other Federal Summary Offences**

Unless otherwise specified, the maximum penalty for a summary conviction offence is a fine of up to $5,000, up to six months of imprisonment (two years less a day on December 18, 2019), or both (*Criminal Code*, s 787(1)). An example of a summary offence which carries a greater maximum punishment is uttering threats, *Criminal Code*, s 264.1(2)(b), which carries a maximum punishment of 18 months of jail time.

b) *Indictable Offences*

Most indictable offences specify the maximum term of imprisonment. If no maximum is specifically stated, the maximum term is five years (*Criminal Code*, s 743). Minor indictable offences (i.e., theft under $5,000) carry maximum jail terms of two years. Other indictable offences carry greater maximum jail terms of five years, seven years (i.e., possession of a narcotic), 10 years (i.e., theft over $5,000), 14 years, or life (i.e., trafficking a narcotic).

VI. RESOLVING THE MATTER PRIOR TO TRIAL

It is important at this point to review the elements of the alleged offence to ensure an understanding of what one is charged with.

A. Stay of Proceedings

After reviewing the police report, if there is not a substantial likelihood of conviction, or it would not be in the public interest to proceed, a letter can be drafted to the assigned Crown Counsel requesting that they reconsider the charge. The contact information for the assigned Crown can be ascertained by calling the Crown Counsel office in the city in which the charge was laid. Regardless of the strength of the case, if it appears that it is not in the public interest to proceed with the charges (e.g., the accused is terminally ill), the Crown may choose to reconsider. A stay of proceedings is a decision to not proceed with the charges. A stay of proceedings appears on the accused's Vulnerable Sector Criminal Record Check. Therefore, a stay may affect the accused's employment if they intend to work with children or seniors.

B. Diversion / Alternative Measures

This option allows for a first-time offender to be "diverted away" from the court system. Although referred to as "diversion," the program's official name is Alternative Measures (*Criminal Code*, s 717).

The accused or the accused's lawyer may make a request to the Crown Counsel office to be "diverted". In some cases, Crown may also recommend diversion. This program takes the accused out of the court system. The application itself may be made before or after a charge is laid. The diversion program is primarily designed for first-time offenders who are prepared to admit their culpability and remorse in the matter. It is advised to call Crown in advance of sending the diversion application to make sure they are open to it. Include the following in the application:

1. That the letter is Without Prejudice;
2. The circumstances of the offence, including a clear admission of all the essential circumstances of the offence;
3. The background of the accused;
4. The effect that a criminal record would have on the accused; and
5. The accused person's feelings of remorse or repentance for the offence.

The accused must understand the concept of diversion and be prepared to speak openly and honestly to a probation officer. The accused must clearly admit to the offence and express remorse for their commission. They may also be required, and should offer in the diversion letter where applicable, to write a letter of apology, undergo anger or stress management counselling, or make restitution. These options could be considered in the letter or during meetings with the Crown.

The Crown will consider whether the accused and the nature of the offence are such that diversion is appropriate. If the Crown decides the accused is a good candidate for diversion, the file will be sent to a community worker who will review the circumstances and then discuss the matter with the accused. The accused is entitled to have legal counsel present at this meeting. If the accused admits their culpability, and the probation officer is satisfied that the accused is an appropriate candidate for diversion, the Crown will be so advised. The Crown will either enter a stay of proceedings or withdraw the charges once diversion has been completed.

The diversion process does not directly affect the ordinary procedure for remand and fixing a trial date. There is nothing inconsistent with fixing a trial date and writing a letter of application for diversion. Some judges think they should not grant adjournment "for the purpose of considering

diversion," since technically the diversion process is separate and apart from the court process. Therefore, although a pending application for diversion can be used as partial justification for applying for an adjournment, that application may not be successful and one should be prepared to move the court process forward at the same time as they are pursuing a diversion request.

See **Appendix D: Diversion Application and Sample Letter** for an example of an application for diversion.

C. Peace Bond (s 810)

A peace bond is a court order requiring a specific individual to "keep the peace and be of good behaviour". A peace bond is not a conviction or a guilty plea; however, a peace bond can restrict an accused person's liberty. Under section 810 of the *Criminal Code* the accused enters into a recognizance with conditions; in addition to requiring that the recipient to "keep the peace and be of good behaviour", a peace bond will also set out specific conditions intended to protect a person or a specific type of property, such as not to contact certain persons, and/or not to attend a certain address or area. These conditions can last up to one year, and the length of the term can be negotiated with the Crown. Although a peace bond is not itself a criminal conviction, breaching a peace bond is a separate criminal offence.

In order for a peace bond to be imposed, there must exist **reasonable grounds** for the complainant to believe that the accused will cause personal injury to the complainant or their spouse or child or that they will cause damage to the complainant's property at the time of the peace bond proceedings. Therefore, in entering into a peace bond voluntarily, the accused is conceding that the complainant has reasonable grounds for their fear. The accused does not have to admit to all of the facts in the Report to Crown Counsel. However, the accused do have to admit to sufficient facts to form a reasonable basis for the victim to fear them. If there are facts that are in dispute, discuss this with Crown first. If both sides come to an agreement, the court process is similar to a sentencing hearing in terms of the submissions that are made. For more information, see the section on **Pleading Guilty**, below.

Occasionally, such as when the Crown wishes to impose a peace bond and the accused does not agree, there will be a full hearing on the issue. The Crown often considers peace bonds in cases of spousal assault because of a victim's reluctance to go to trial. At the hearing, the Crown must prove on a **balance of probabilities** that there are reasonable grounds for the fear. **Hearsay evidence is allowed, as it goes to the informant's belief that there are grounds for the fear** (*R. v P.A.O.*, [2002] BCJ No 3021 (BC Prov Ct)). Since there is no criminal standard of proof, the judge must look at **all** the evidence, and not focus merely on the absence of the offending conduct (*R v Dol*, 2004 BCSC 1438).

If a person breaches the peace bond, a criminal charge may be laid against the bonded person. Peace bonds are sometimes used as alternatives to criminal charges like uttering threats (s 264.1), criminal harassment (s 264), and minor assaults (s 266). The benefit to the accused is that formal criminal charges are dropped. The benefit to the complainant is that the no-contact condition of a peace bond addresses their concerns without raising the uncertainty and possible trauma of a trial. An accused should be advised that while a peace bond is not a criminal record, it may affect future hearings, travel outside the country, and decisions concerning custody.

D. Pleading Guilty

A guilty plea is appropriate when:

a) diversion is not granted;
b) a peace bond is not appropriate;
c) the accused admits guilt;
d) it appears that the Crown will be able to prove its case; and

e) the accused wishes to plead guilty.

If an accused person wishes to plead guilty then the court appearances should be adjourned to allow sufficient time to "negotiate" with Crown Counsel for the most appropriate sentence. For self-represented litigants, a duty counsel will assist with a sentencing negotiation with a Crown. It is generally a very good strategy to talk to Crown in advance about a joint submission where both sides agree on a sentence. Most Crown Counsel will be eager to agree to a reasonable sentencing position. Whether an agreement can or cannot be reached with the Crown, a sentencing hearing will be scheduled at which the accused/defence can present their position. If an agreement is reached with Crown, it is important to know that the judge is **not** bound by a joint submission. Though making a joint submission does increase the likelihood the accused will get the sentence defence is arguing for, it does **not** guarantee it [*R. v. Anthony-Cook*, 2016 SCC 43]. See **Appendix E: How to Prepare for and Conduct a Sentencing Hearing** for the process of a guilty plea.

Consequences of a guilty plea may include, but are not necessarily limited to:

- possible inability to obtain a passport or to enter the U.S.;
- difficulty or impossibility of entering some postgraduate fields of study such as law;
- exclusion from jobs requiring bonds;
- possible use of the conviction in subsequent proceedings; and
- possible deportation if the accused is not a Canadian citizen.

In cases where there are two or more charges, a judge may order that sentences be served consecutively (one after the other) or concurrently (at the same time). Consecutive sentences are often ordered when the offences are unrelated and of a serious nature, with the courts evaluating factors such as the nature and quality of the criminal acts, the temporal and spatial dimensions of the offences, the nature of the harm caused to the community or victims, the manner in which the criminal acts were perpetrated, and the offender's role in the crimes.

In cases where a judge finds it appropriate to impose consecutive sentences, they must ensure that the entirety of the sentence is not excessive, in keeping with the Totality Principle. According to this principle, the global sentence imposed by the judge must be proportionate to the gravity of the offences and the degree of responsibility of the offender. The sentence must also respect the principle of parity, which requires that similar sentences are imposed for similar offences committed by similar offenders in similar circumstances.

The judge also has discretion to credit an accused with any time spent in custody as a result of the charges.

E. Sentencing Hearing

Before a sentence is given, the accused, or counsel for the accused, must be permitted to "speak to sentence" and make submissions to the judge that could affect the sentence. This is done primarily through counsel's submissions.

Prior to the sentencing hearing the accused and counsel for the accused should review the Report to Crown Counsel to determine whether they agree with the circumstances of the offence as set out in that document. The Report to Crown Counsel is typically where crown counsel will read/summarise the facts of the offence from. If the accused person disagrees with a material aggravating fact summarised in the Report to Crown Counsel, that disagreement should be canvassed with crown counsel and where the parties cannot agree the party seeking to establish that (aggravating or mitigating) fact must present evidence of the disputed facts (see s. 724 of the *Criminal Code* for how the court determines disputed facts). Note: Sometimes this needs to be done in the moment where crown counsel summarizes an aggravating fact and the accused and their counsel realises only then that the aggravating fact is not agreed to.

For serious offences, prior to the actual sentencing hearing the accused or counsel for the accused should consider whether the guilty person would benefit from seeking a Pre-Sentence Report under s. 721 of the *Criminal Code*. A Pre-Sentence Report can only be ordered after a guilty plea or finding is made. It is prepared by probations, and is considered a "neutral third party" report It is a formal report and can help or harm the interests of the accused. If the accused is experiencing mental health issues, the Pre-Sentence Report can include a psychological report. A favorable psychological report can reduce an accused's eventual prison sentence. A psychological disorder that makes a person more likely to lose control of their emotions or impulses mitigates the moral culpability of an offender for offences where that emotion or impulse contributed to the occurrence of the offence. Where an accused person desires to obtain a psychological opinion they should consider obtaining a private psychological report from a psychologist of the guilty person's choosing instead of a Pre-Sentence Report with a psychological component. A private psychological report commissioned by the accused person or their counsel has the advantage of being legally privileged and is only disclosed if it helps the accused. This avoids the possibility that exists with a Pre-Sentence Report that the contents of that report will suggest that the offender has limited prospects of rehabilitation, thereby supporting a lengthier custodial sentence.

Crown presents their submissions in the sentencing hearing first. Assuming that there is no substantial disagreement on the facts of the offence, crown counsel will simply blend together their summary of the facts of the offence and their position on the appropriate sentence and the accused or counsel for the accused will do the same in reply.

After hearing Crown recommendations and then defence submissions, the judge will give a sentence. For more on the substance and procedure of speaking to sentence, see **Appendix E: How to Prepare for and Conduct a Sentencing Hearing.**

It is important to **consult sections 718 and 718.2 of the *Criminal Code*** for the principles in sentencing that the judge will consider, **and address these issues when drafting your submissions**. The accused should also read up to section 743.1 of the *Criminal Code* before any sentencing hearing.

There tend to be two broad strategies for presenting an accused person's circumstances. With first time offenders, this typically involves presenting the lead-up to the offence as a unique set of unusual circumstances that caused a momentary and exceptional loss of control and then showing what has changed in the life of the accused to avoid a similar set of unusual and exceptional circumstances. The accused should seek to show the court that the problem has already been cured and will not recur, and such a harsh sentence is unnecessary. With repeat offenders, it is more strategic to present the disadvantageous life circumstances, such as lack of family support or lack of employment/educational opportunities, which may have contributed to the offence being committed. The accused should then show that they have changed their outlook and is seeking to turn their life around. This involves in part an understanding of an accused person's own situation, and an understanding of the severity of the offence.

NOTE: In cases of **Aboriginal offenders**, reference must be made to section 718.2(e) and the principles enunciated in *R v Gladue*, [1999] 1 SCR 688.

F. *Types of Sentences*

a) *Absolute or Conditional Discharge*

Discharges are outlined in section 730 of the *Criminal Code*:

- They are available if the accused is not subject to a minimum penalty and the offence is not one punishable with a maximum sentence of 14 years of imprisonment or more

- A discharge means that there has been a finding of guilt rather than a conviction. At the end of the discharge period, the accused has no criminal record.
- The discharge must be in the best interests of the accused and not be against the public interest.
- An absolute discharge means that the accused has no criminal record immediately upon being sentenced.
- A conditional discharge means that the accused is on probation, with certain conditions, for a period of time. If the accused follows the rules, at the end of the probation period they are treated as if there were no conviction and will not have a criminal record.
- An absolute discharge is granted immediately without terms or conditions, whereas the effect of a conditional discharge is that the accused is on probation for a period of time. This can involve a number of various conditions the accused must abide by. If the accused successfully completes the period of probation with no breaches or further criminal offences, the conviction is discharged and the offender can say they have no prior convictions. It is important to note however that an absolute or conditional discharge still requires a finding of guilt.

NOTE: Each of the sentences listed below results in a conviction and a criminal record

b) Suspended Sentences and Probation

If the judge believes, having regard to the age, character and personal circumstances of the individual, that the accused can rehabilitate themselves, the judge can suspend the passing of sentence and release the accused subject to the terms of a probation order of up to three years (*Criminal Code*, s 731(1)(a)). This does not mean that the accused has been acquitted; **at the expiry of their probationary period, the accused will still have a criminal record**. This is an important difference between a suspended sentence and a conditional discharge.

The sentence is available if the accused is not subject to a minimum penalty. An accused can be sentenced to probation for up to three years. Probation means that the accused has to follow certain conditions that the judge sets. For example, the accused will have to stay out of trouble, report to a probation officer (someone who keeps track of the accused), and obey other court-imposed conditions. An order for a suspended sentence means that the courts suspend the passing of a sentence for the duration of the probation period. If a person breaches the conditions of a suspended sentence the court may extend the length of the probation period or (in rare cases) revoke the suspension of sentence and substitute a jail sentence for the suspended sentence. In addition, the breach is a new criminal offence and the accused may be convicted for a breach of the probation conditions (typically 2 or 3 days of jail time for a first offence or weeks of imprisonment for repeat offenders).

c) Fines

Under section 734 of the *Criminal Code,* an accused may be fined in addition to, or in lieu of, another punishment for offences punishable by imprisonment of five years or less for which there is no minimum penalty.

A fine can be ordered on its own or in addition to probation **or** imprisonment (but not both). An accused may be fined up to $5000 for summary conviction offences (or a hybrid offence where the Crown elects to proceed summarily), or any amount for indictable offences. Before a court imposes a fine, it must inquire into the ability of the accused to pay the fine.

d) *Restitution and Compensation*

Restitution orders can be made as "stand-alone" orders imposed as an additional sentence (s 738 of the *Criminal Code*) or as a condition of probation or conditional sentence order by the court. The restitution can be ordered for the cost of repairing any property damage, replacing lost or stolen property, or any physical or psychological injuries suffered by a victim who required the victim to incur out of pocket expenses or resulted in a loss of income.

e) *Conditional Sentence Order (CSO)*

This is a jail sentence and occurs when a court orders the accused to serve their jail sentence in the community. It is not allowed when there is a minimum sentence of imprisonment, when there is a term of imprisonment of two years or more imposed, or where the offence involved a serious personal injury. The term "conditional" refers to rules the offender must follow in order to remain out of jail. The conditions are often similar to conditions imposed on a probation order; however, a curfew is almost always imposed. An accused that breaches any of their conditions or commits a new crime may be ordered to complete the remaining portion of the sentence in prison.

f) *Imprisonment (Jail)*

Unless otherwise stated by statute, if the offence is a summary conviction offence (or Crown elects to proceed summarily), the maximum sentence of imprisonment is 6 months (two years less a day after December 18, 2019); and if the offence is an indictable offence (or the Crown elects to proceed by indictment), the maximum sentence of imprisonment is 5 years. There are many offences where the maximum sentence stated is in excess of 5 years. A judge has the discretion to order a sentence to be served concurrently (at the same time) or consecutively (one after the other) with any other sentence the accused is serving, or any other sentence arising out of the same transaction.

If the total sentence is two years or more, the accused will serve their sentence in a federal penitentiary. If the total sentence is less than two years, the accused will serve their sentence in a provincial jail. An accused should note that "two years" includes time already served before trial. So, a person who is sentenced to two years of imprisonment, but has served one week in jail, will not be sent to a federal penitentiary.

If a judge imposes a sentence not exceeding 90 days, they may order that the sentence be served intermittently on certain days of the week or month. The accused is released on the other days, subject to conditions of a probation order.

G. *Matters Ancillary to Sentencing*

a) *DNA Data Bank*

If an offender is convicted of a "primary designated offence" enumerated in section 487.04 of the *Criminal Code* – for example, sexual interference (s 151) and sexual exploitation (s 153) – a court must order the taking of bodily substances for the purposes of forensic DNA analysis, unless the impact on the person's privacy would be "grossly disproportionate" to the public interest.

The court may also consider the criminal record of the offender, the nature of the offence, and the circumstances surrounding its commission. The court may also, at its discretion, make a DNA order upon conviction or discharge of a "secondary designated offence" – such as assault – but the threshold for obtaining a DNA

order is higher for these offences. Once the substance is analysed, it is then entered into the Convicted Offender Index of the national DNA Data Bank. The data bank is widely used for many different types of crimes ranging from violent crimes to fraud involving impersonation.

b) Victim Fine Surcharge

A victim surcharge is an additional penalty imposed on convicted offenders at the time of sentencing.

In *R v Boudreault*, 2018 SCC 58, the Supreme Court of Canada considered the constitutionality of section 737 of the *Criminal Code*, which removed any judicial discretion to waive the Victim Fine Surcharge. The court ruled that a mandatory victim surcharge amounted to cruel and unusual punishment contrary to section 12 of the *Charter* and that "its impact and effects create circumstances that are grossly disproportionate to what otherwise would be a fit sentence, outrage the standards of decency, and are both abhorrent and intolerable." The court decided that section 737 was not justified under section 1 of the *Charter* and declared that section 737 was of no force or effect. As a result, the courts have discretion to waive the surcharge in appropriate circumstances. The primary reason for waiver of the surcharge is lack of ability to pay.

The current section 737 of the *Criminal Code* re-introduces the requirement that judges apply the victim surcharge to all convictions and discharges. However, the court has the discretion to waive the victim surcharge in the event that it would cause undue hardship on the offender or would be disproportionate to the gravity of the offence or the degree of responsibility of the offender. Where the surcharge is waived, the court must provide reasons for doing so.

VII. PLEADING NOT GUILTY/TRIAL

A. Arraignment Hearing

The purpose of an **arraignment hearing** is for the court to be advised whether the matter is for trial or disposition (guilty plea) and to set aside the required court time for the trial or disposition. It is also an opportunity to canvass any possible disclosure or *Charter* issues. If the accused is not prepared to make a decision on whether to plead guilty or run a trial at the time of the hearing, the arraignment hearing should be adjourned until the accused can consult a lawyer and make a decision.

1. Arraignment Hearing (Trial Fix Date Procedure)

At the arraignment hearing, a not guilty plea is entered and the time estimate for the trial is confirmed. The Crown will provide the court with its time estimates and the number of witnesses. It is essential for the self-represented accused or the defence counsel to note this information.

The judge or JP will then ask the self-represented accused (or defence counsel) for their position on the time estimate and then decide how much time is appropriate to set aside for the trial. The clerk will provide counsel with a form to take to the Judicial Case Manager (JCM) to set a trial date. It is important that the accused attends the JCM to receive a trial date.

B. Appearance for Trial - Elections as to Mode of Trial

1. Summary Conviction Offences

The accused has no right of election. The trial is held before a Provincial Court judge. There is no preliminary inquiry.

2. Hybrid Offences and Indictable Offences

For a hybrid offence where the Crown chooses to proceed summarily, see above.

For a hybrid offence where the Crown chooses to proceed by indictment, or where the offence is strictly indictable, the accused has the right to elect a mode of trial, unless the indictable offence is listed in sections 469 or 553 of the *Criminal Code*.

Where the accused has the right of election, they will be asked to elect at the arraignment hearing.

3. Electable Offences

For a list of electable offences, see sections 536 (4), 554, 558, 565 and 471 of the *Criminal Code*. For an offence not listed in sections 469 or 553, the accused may elect to be tried by:

a) Provincial Court trial with a judge, without a jury;
b) Supreme Court trial with a judge, without a jury; or
c) Supreme Court trial comprised of a judge and jury.

If the accused/defence fails to elect when the question is put to them, under section 565(1) of the *Criminal Code* they will be deemed to have elected a trial in Supreme Court with a judge and jury.

If an accused/defence elects a Supreme Court trial, they have the right to test the Crown's case in a Preliminary Inquiry (see below). This right to a preliminary inquiry can be waived by the accused/defence, however, this rarely occurs because the most common reason for electing a trial before a Supreme Court (instead of a Provincial Court) is to gain the advantage of testing and discovering the Crown's case during the preliminary inquiry.

If there are two or more accused who are jointly charged in an Information, then under section 536(4.2), if one party elects to proceed before a Supreme Court and the other wants Provincial Court, both are deemed to have elected to proceed in Supreme Court. If one person elects a judge and jury in Supreme Court and the other elects judge alone, both are deemed to have elected to proceed by judge and jury.

4. Preliminary Inquiry

A preliminary inquiry is held before a Provincial Court judge. The primary purpose of a preliminary inquiry is to determine whether or not there is sufficient evidence to put the accused on trial. Whether or not there is sufficient evidence is measured on a very low threshold. The test is "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty." *USA v Shephard* [1977] 2 SCR 1067. If the judge determines that there is sufficient evidence then the accused will be ordered to stand trial; if the judge finds that there is not sufficient evidence, the accused will be discharged.

Although the primary purpose of the Preliminary Inquiry is to determine if there is sufficient evidence to meet the threshold test for committal, the 2004 amendments to the *Criminal Code* substantially streamlined the Preliminary Inquiry process. The historical secondary purpose of defence counsel using the Preliminary Inquiry process to discover and test the case remains an important secondary purpose. See [*R v. Rao* [2012] BCCA 275 (CanLII)] at paras 96-98.

Preliminary inquiries are only available to those accused who elect to be tried in the Supreme Court (by judge only or by judge and jury) and when at least one of the charges on the indictment is punishable by imprisonment for 14 years or more.

C. The Trial

1. Conduct of the Trial

The standard Provincial Court trial generally proceeds by the following procedure:

1. The Crown calls the case and introduces itself.
2. The defence/accused stands and introduces themself. This will be done by the defence counsel if the accused has a lawyer.
3. Usually, Crown asks for an order excluding witnesses, which excludes any witnesses about to testify in the matter from the courtroom until such time as they are called. If Crown fails to do so and there are any witnesses in the courtroom, defence should remind the court of the need to make such an order.
4. Crown will call its witnesses (called **direct examination**), and defence may **cross-examine** each witness as they are called.
5. Crown indicates that their case is closed.
6. Defence/accused can choose to:
   a. make a "no evidence" motion (this is done prior to deciding to call evidence);
   b. choose not to call any evidence; or
   c. call defence witnesses.
7. If a defence is called, they can then call witnesses, starting with the evidence of the accused as their evidence should not be tainted by hearing the evidence of other defence witnesses prior to the accused giving evidence. Crown may cross-examine each witness as they are called.
8. If a defence was called, defence counsel makes closing submissions, then Crown.
9. If a defence was not called, Crown makes closing submissions first, and then defence counsel.
10. The judge will consider the facts and law, make findings of fact and give their decision and reasons. If the accused is found guilty, a Pre-Sentence Report (PSR) may be ordered. If one is not ordered, the judge will then hear sentencing submissions.

2. Nature of the Trial

The goal of the defence at trial is **NOT** to find the truth or to seek justice. The goal of the defence counsel (or the accused if self-represented) is to test the Crown's case and to present evidence where appropriate, in order to either show that the evidence as a whole fails to prove the accused's guilt beyond a reasonable doubt, or to raise a reasonable doubt as to the guilt of the accused. Keep in mind that one way to reach reasonable doubt is to convince the trier of fact that based on the evidence presented, they simply cannot know for sure what happened. The adversarial process with defence counsel and Crown Counsel fulfilling their respective roles before a neutral trier of fact has been one of the most effective ways to find the truth and seek justice. The adversarial process depends

upon capable defence counsel vigorously challenging Crown's case and pursuing all viable defences.

3. *Presentation of Prosecution's Case*

Once a plea has been entered, witnesses will be excluded and the trial begins. The Crown may start with an opening address and then begin calling witnesses for examination and introducing any real evidence (objects, documents, etc.). Next, defence counsel or the accused (if not represented), may cross-examine the Crown witnesses. The Crown may then re-examine their witness; however, this re-examination is limited to clarifying or explaining answers given during cross-examination. No leading questions may be put during re-examination and new material can be entered only with leave of the Court. If leave is granted, and new material entered during re-examination, then the defence will be given an opportunity to cross-examine on the new evidence (See: Earl J Levy, *Examination of Witnesses in Criminal Cases*).

The goal in cross-examination is to demonstrate that this particular witness's evidence is less worthy of belief, by challenging the witness's reliability or credibility, or both. The defence/accused is entitled to cross-examine a witness on any issue that is relevant or material to the case. The defence/accused does not have to have evidence on a particular point but does have to have a reasonable basis to believe whatever it is suggesting to the witness. The rule in *Browne v. Dunn* (1893) 6 R 67, H.L, states that the defence/accused must put its case to each witness on cross-examination. This means that if there is a good possibility that the accused will testify in their own defence or the accused has a specific defence/accused theory that defence/accused counsel will argue at the end of the defence/accused's case, then each Crown witness must be confronted with the defence's/accused's anticipated defence evidence or theory and provided the opportunity to comment upon that evidence or theory. Typically, this is done at the end of the defence/accused's cross-examination of each witness with a number of "I suggest to you that…"

Reliability refers to a witness's ability to perceive an event accurately, and later recall and describe that event with detail and precision. This can be the scene, lighting, visibility, any obstructions or distractions, which may have affected the witness' perception. It can also be the state of the witness at the time (perhaps they were intoxicated at the time).

Credibility refers to a witness's desire or motivation to describe that event truthfully. Some common credibility challenges include:

- Motive based on personal animus towards the accused;
- A motive based on a personal bias towards the complainant or victim of the alleged crime;
- A motive based on a perceived advantage from the police arising from providing evidence to the police; and
- A witnesses' character is such that they simply cannot be trusted (history of perjury, fraud or lying to the police).

Practice Recommendation - Prior Inconsistent Statements

Sections 9 and 10 of the *Canada Evidence Act* outline the principles of cross-examination as to previous statements of a witness in criminal investigation. Prior statements can be used to question the reliability or credibility of that witness. The trier of fact decides whether there was actually an inconsistency and whether that inconsistency affects the witness's credibility or reliability or both.

There are times when the defence may not want to put a prior statement to a witness, even if there are inconsistencies (i.e., if the previous version is much worse than the version the witness presented in court).

Procedure for putting a prior inconsistent statement to a witness:

1. "You gave a statement to the police on December 4, 2010?" (yes). "I am showing you a transcript of that statement." OR "I am showing you a 4-page written statement. Is this your handwriting? Are those your initials at the bottom of each page and your signature at the end of the document?"

2. "I refer you to page 3, line 8, where you said '[read out what is in the transcript or statement verbatim, including any ums and ahs. However, you may abbreviate any swear words to their first letter]' You said that? (yes) You knew it was important to tell the police the truth? (yes) That was the truth?" (if no) So you lied to the police when you told them that?

3. "You said in your direct examination when my friend was asking you questions [summarize conflicting evidence from your notes]?" (yes) But here you told the police [reread the line of the transcript]. Which version do you now say is the truth?

a) Common Objections

When the Crown is in the process of examining its witnesses, it is the defence/accused's job to ensure the Crown is doing so properly. Below are some common actions that lead to objections in a trial. In order to raise an objection, the defence/accused must rise from their seat, face the judge, say "objection," and then state the reason for the objection. At that point, the Crown will either agree or disagree with the objection. If the Crown disagrees, the judge will make a ruling on the spot regarding the objection. The defence/accused should also consider whether the witness should be excused from the courtroom prior to stating the reason for the objection.

Leading Questions:

A leading question is one where the answer is suggested in the question. For example: "did you see Joe punch Steve?" The party calling the witness cannot ask leading questions. <u>However, on cross-examination, the practice is allowed and encouraged.</u> A common exception to the rule against leading questions in direct is when leading questions are used in order to introduce matters to the court. For example, "Your name is John Doe and you reside at 555 University Drive?" Leading questions may also be used in direct examination if they relate to non-contentious issues. (Note: it is good practice to let the Crown counsel know what the contentious issues are ahead of time in order to prevent an objection of leading a witness during trial).

Hearsay:

Witnesses are expected to tell the court what they personally observed, heard or did. Hearsay is a common objection that arises because witnesses are often told things by other persons about the event.

Hearsay is generally defined as an out of court statement, offered in evidence to prove the truth of the matter asserted. The key factor in determining if a statement is, in fact, hearsay is the purpose for which the statement is being used. For example, if the witness on the stand states "the passenger in the car told me that the light was red" this is hearsay if: it is being used to prove that the light was actually red. It is unobjectionable and being used for a non-hearsay purpose if the colour of the light is not a contentious fact and the statement is instead being used as evidence that the passenger was alert and responsive.

There are some categorical exceptions to the hearsay rule, where evidence even though introduced for a hearsay purpose, will generally be admissible if the prerequisites for that exception are met. These are called the "traditional" exceptions to the hearsay rule and include:

1. voluntary confessions;
2. dying declarations;
3. declarations against the interest of the declarant;
4. records made in the usual course of business and in the course of a duty which are admissible under the *Canada Evidence Act* (for example, hospital medical files);
5. declarations of a state of mind or bodily condition as evidence of the state reported, but not of its cause (for example, using the declaration "I'm cold" to establish that the person making the statement was cold, but not using it for the assumption that the weather outside was cold that day);
6. statements of intention (used to increase the probability that the person who made the statement actually performed that intended action);
7. spontaneous declarations (*Res Gestae* - statements made so closely to the event that they are connected to it; and
8. Past Recollection Recorded.

Each "Traditional" exception has its own requirements that must be met. In addition to (and as a potential exception to) the traditional common law exceptions, courts have developed the "principled approach" to determining the admissibility of hearsay. See *R v Starr*, [2000] 2 SCR 144. This approach considers the necessity and reliability of the hearsay statement and can be used where there is no traditional hearsay exception engaged or to argue that evidence should be inadmissible despite a traditional hearsay exception. The two requirements that must be met before hearsay evidence is admitted are:

1. Necessity: whether the benefit of the evidence would be lost in its entirety if it is not entered (i.e., the declarant, the person who originally made the statement, is unavailable, or there is no other source by which the evidence can be admitted and have similar value); and
2. Reliability: this test is essentially the judicial determination of what would have been gained by cross-examination. In some cases, the

circumstances in which the statement was made suggest its trustworthiness and reduce the danger of admitting evidence without an opportunity for cross-examination.

For a thorough discussion of the rules of hearsay admissibility, see *Watt's Manual of Criminal Evidence* and [*R v Khelawon*, [2006] 2 SCR 787](#).

Speculation:

When people witness behaviour in everyday life they often reach conclusions regarding why they think that other person was behaving in that manner. Witnesses are expected to tell the court what they saw a person say and not to speculate as to why they think that person did what they did. For example, if one sees someone jumping up and down and swatting at the air one may speculate that the person is being bothered by an insect. Such speculation is not proper evidence unless the witness also saw or heard the insect.

Opinions from Non-Experts:

As a rule, witnesses should not make any inferences or state their opinion about what that evidence proves in their testimony (for example, "I think Steve was going grocery shopping because I saw him with an empty fabric grocery bag"). Instead, the witness should simply state "I saw Steve and, in his hands, he was holding an empty fabric grocery bag." Conclusions drawn from what is seen or heard is for the trier of fact to draw not the witness to opine. There are often exceptions to these exceptions. For example, although generally the court does not permit non-expert opinion evidence, someone who is intimately familiar with a person's appearance can in certain situations provide evidence that they recognise that person from surveillance photographs or video.

4. *Challenging the Admissibility of Evidence*

Prior to the trial commencing, the defence/self-represented accused should have reviewed the key evidence in the case and identified potential challenges to the admissibility of that evidence. One should consider if the admissibility issue or *Charter* challenge to the evidence can be canvassed with the Crown prior to the start of a trial. Generally, unless there is a good strategic reason to not inform the Crown, (i.e., informing the Crown will allow it to call additional evidence that the defence knows is available, but is not currently being called) admissibility issues should be brought to the Crown's attention ahead of time.

Since rules of admissibility of evidence tend to be complex issues that require a critical analysis of the law followed by an application of the law to the facts, a self-represented accused person should consult legal advice when challenging the admissibility of Crown's evidence. Some challenges to the admissibility of evidence are simply made through objections and legal arguments at the time the Crown seeks to adduce the evidence, while others will require the court to hear additional evidence that is relevant to its admissibility.

5. *Voir Dires*

A *Voir Dire* is usually referred to as a "trial within a trial". It is usually held during the Crown's case where evidence is required in order to determine the admissibility of evidence. For example, *Voir Dires* can be held to determine whether a confession is voluntary and admissible or whether it should be excluded under section 24(2) of the *Charter*. If the evidence heard in the *Voir Dire* is deemed to be admissible, counsel can agree that evidence on the *Voir Dire* will form part of the evidence at trial.
Two very common *Voir Dire* challenges are a challenge to the admissibility of items seized in a search and a challenge to the admissibility of an accused's confession to the police.

If there are grounds to challenge a search, Crown Counsel must be alerted to the fact that the defence/accused will be challenging the admission of the items seized during the search into evidence with sufficient detail to put Crown on notice as to the nature of that challenge (typically an alleged breach of section 8 of the *Charter*).

If Crown is seeking to enter a confession into evidence that was given to the police (or other person in authority) Crown Counsel must first establish that the confession was voluntary in a *Voir Dire*. It is common practice that any alleged breaches of section 10 of the *Charter* (i.e., accused not provided with access to counsel prior to their interrogation) are dealt with at the same time as Crown Counsel's *Voir Dire* on voluntariness.

If an accused testifies at a *Voir Dire,* they can only be cross-examined on the issues raised in the *Voir Dire*.

6. Directed Verdict/ No Evidence Motion

In all criminal cases, it is the Crown's obligation to prove beyond a reasonable doubt:

1. The time and date of the offence;
2. The location and jurisdiction of the offence (e.g.: it happened in Surrey, British Columbia); 3. The identity of the accused;
4. That the crime actually happened (*Actus Reus*); and
5. That the accused intended to commit the crime (*Mens Rea*).

If the Crown failed to lead *any* evidence on any of the above, the defence/accused should make a no-evidence motion. This asks the judge to direct the acquittal of the accused on the ground that there is absolutely no evidence of some essential element of the offence. The test was articulated by Ritchie, J. in *USA v Shephard* and [*R v Charemski*, [1998] 1 SCR 679]. Arguments by the Crown and defence will be heard. If the defence/accused's "no evidence" motion fails, the defence/accused may then call its own evidence.

NOTE: The defence/accused may make an insufficient evidence motion when the Crown has failed to bring sufficient evidence to prove a specific element of the offence beyond a reasonable doubt. If an insufficient evidence motion fails, the defence/accused cannot call evidence. In practice, the only time defence brings a no evidence motion is when the client may want to give evidence at trial. If defence counsel is of the view that there is no evidence and the accused will not testify, the defence will bring an insufficient evidence motions (stating that the Crown has not proven its case). When the accused does not testify, the defence will make closing submissions last. When the accused does testify, the defence will make closing submissions first. It is a perceived advantage to go last.

7. Presentation of Defence Case

All accused have the right to testify in their own defence and the right to call other witnesses.
After the defence/accused examines its witnesses, the Crown has the right to cross-examine these witnesses. The defence/accused may re-examine them in relation to new areas that could not have been anticipated ahead of time. For a discussion on when this is appropriate, see “Presentation of Prosecution’s Case,” above (see *Examination of Witnesses in Criminal Cases* by Earl J Levy QC for a discussion of these techniques).

Although the decision for the accused to take the stand and testify in their own defence does not have to be made until Crown has closed its case, the defence/accused needs to know their potential defences before the trial begins. Where the accused has identified a defence for the crime, it is often a good idea to structure the entire defence case around highlighting that defence. However, the defence/accused should pay careful attention to capitalize on the Crown’s failure to present an element of the offence. The defence/accused should also remember that a no-evidence motion may be brought and decided before the accused must decide to testify or not.

The defence/accused will be invited to make closing submissions once all evidence has been heard. If the defence/accused has called evidence, the defence closes first. If the defence/accused does not call evidence, Crown closes first. The three main sections of closing submissions are i) the facts, ii) the law, and most importantly, iii) applying the law to the facts that the judge should find. The judge can accept all, part, or none of a witness’ testimony. If the accused testifies, the *W(D)* principles (below) should also be discussed.

Practice Recommendation - Entering Exhibits

An exhibit should be entered through the witness who made (or found) the exhibit so they can validate it. Exhibits may be a photograph, a written document such as an email, or physical evidence such as an assault weapon. In the case of a photograph, the person who took the actual photograph is the one likely to enter the exhibit. It is also possible for the person identified in the photograph to enter the exhibit.

Example of an exhibit being entered by someone who took the photograph:

- “You have previously provided me with a photograph. Did you take this photograph? When did you take this photograph? And this is a true and accurate depiction of the scene as depicted on the date you took the photograph?” “Your Honour, I ask that this photograph be entered as the next exhibit”

Example where an individual depicted in the photograph enters the exhibit:

- “You have provided me with a photograph of some injuries. Who is depicted in this photograph? When was this photograph taken? And is this a true and accurate depiction of your injuries as of the date this was taken? “Your Honour, I ask that this photograph be entered as the next exhibit.”

The court will number each exhibit as they are entered. Either place the appropriate number on your copy of each exhibit or keep an exhibit list so that you may refer the court or other witnesses to them later.

Note: When entering an exhibit such as a statement that defence wants to rely

a) Common Defences

For the defences below to be raised, they must have an air of reality. This means that all of the elements of the defence would exist if the defendant were believed on the stand. The defendant is responsible for raising this air of reality. Once that is completed, in order to obtain a conviction, the Crown must then prove beyond a reasonable doubt that the defence was not applicable in the circumstance. If that is not achieved, the defendant is acquitted.

Self Defence: sections 34-42 of the *Criminal Code*

There are conditions where self-defence can be raised when the charge is assault. This can occur in a situation where the accused perceived force or a threat of force, their state of mind was to act in a defensive manner, and the actions taken by the accused were reasonable in the circumstances. This defence can take into account various factors, such as whether the accused had an alternative, the proportionality of the force used by the accused in the act or assault to the threat or assault, as well as any history that may exist between the parties.

Consent:

If an accused is charged with assault, Crown must prove beyond a reasonable doubt that the other person did not consent to the assault. A consensual fight is not an assault as the parties are consenting to the physical contact. Consent can be negated or vitiated where the force causes bodily harm *and* was intended to be caused or the force was applied recklessly and the risk of the bodily harm was objectively foreseeable [*R v Paice*, 2005 SCC 22]. In *R v Jobidon*, [1991] 2 SCR 714 the Court held that consent cannot be used as a defence for a criminal act such as assault which may cause "serious hurt or non-trivial bodily harm".

Lack of *Mens Rea*:

Mens Rea deals with the mindset of the accused at the time of the incident and means "guilty mind." *Mens Rea* of the offence must be proven by the Crown beyond a reasonable doubt. If the accused person did not intend to commit the offence, they can raise a reasonable doubt as to whether they had the proper *Mens Rea* to commit the offence, particularly where the offence has a subjective *Mens Rea* requirement. *Mens Rea* is not a defence, but merely lack of an essential element that the Crown needs to prove.

One commonly occurring offence is a Breach of a Court order. Until recently there was some uncertainty about whether or not a Breach of a court order had to be established subjectively (the accused knew or was reckless about whether or not they were breaching) as opposed to objectively (a reasonable person in the position of the accused would have known that they were breaching) The Supreme Court of Canada resolved this issue finding that Breaches require proof of subjective *Mens Rea*, (*R v Zora*, 2020 SCC 14).

Examples:

The main *Mens Rea* components to the charge of theft are that the action was without colour of right and the individual had intent to steal. Colour of right refers to an individual's belief that they had entitlement

to the property. If the court finds there is reasonable doubt as to the intention of the accused to steal the accused will not be found guilty.

The main *Mens Rea* components of the charge of "Personal Possession of a Controlled Drug or Substance" includes knowledge of the substance. The possessor must know the nature of the item. An accused has a *Mens Rea* defence to possession if:

1) the accused did not know they had the item on them; or 2) the accused did not know the nature of the item or was not reckless or wilfully blind as to the nature of the item (for example, the accused reasonably thinks the substance is baking soda and not cocaine).

Intoxication:

When considering the defence of intoxication, it is important to note that there are two types of offences divided by the requisite mental fault. General intent offences merely require the accused to carry out the act or omission while specific intent offences require the accused to carry out the act or omission and intend for the consequence to come about.

There are only two levels of intoxication that are considered to be legally relevant: advanced intoxication and extreme intoxication (a level akin to automatism). Note that these are both very high levels of intoxication, and mild intoxication does not qualify an accused for this defence.

For general intent offences, advanced intoxication is not a defence. Extreme intoxication can negate general intent or physical voluntariness of *Actus Reus* for some offences if the accused can show that they did not commit the act with conscious mind and controlled body. However, the defence may be denied under s 33.1 of the *Criminal Code* if the intoxication is self-induced, the accused made a marked departure from the standard of care, and it is a violent offence. General intent offences include assault causing bodily harm, manslaughter, sexual assault, and arson.

For specific intent offences, advanced intoxication can negate subjective mental fault (*Mens Rea*), and extreme intoxication can negate physical voluntariness (*Actus Reus*) for the offence. Specific intent offences include murder, robbery, assault with intent to resist arrest, and possession of stolen property.

8. Accused Testifying

The accused cannot be compelled to testify (see s 11(c), *Charter*). If the accused chooses not to testify, no adverse inference may be drawn from that decision. A decision to call the accused should be made on the particular facts of each case, taking into account the strength of the Crown's evidence and the risks of exposing the accused to cross-examination. Prior convictions for crimes of dishonesty (e.g., theft, fraud, etc.) are admissible for the purpose of assessing credibility of the accused only.

If the accused has a criminal record and plans on testifying in their own defence, then the

defence/accused should be prepared to argue a *Corbett* application [see [*R v. Corbett* [1988] 1 SCR. 670]] at the end of Crown counsel's case and before a final decision is made to have the accused testify, particularly if the accused has convictions for crimes that are similar to the crime alleged.

If the accused testifies, the judge must consider the instructions set out in [*R v. W(D)* [1992] 1 SCR 742]*:*

1. If the judge believes the accused, they must acquit;
2. If the judge does not believe the accused, but is still left with a reasonable doubt from the testimony, they must acquit; and
3. Even if the judge does not believe the accused and is not left with a reasonable doubt from the testimony, the Crown must still prove its case beyond a reasonable doubt.

9. Presence of the Accused

As a general rule, the accused must be present and remain in the courtroom throughout the trial. In very unusual circumstances, the case may proceed *ex parte* (i.e., in the accused's absence).

10. Witnesses

a) Privilege and Compelling Attendance of a Witness

Both sides may contact any and all witnesses who will be called at trial, including police officers. However, witnesses are not required to speak to Crown or defence counsel prior to the trial.

A witness may be compelled to attend trial to give evidence and to bring documents by means of a subpoena processed through the court registry that is personally served on them (ss 699 and 700 of the *Criminal Code*). An arrest warrant may be issued for non-compliance (s 705). Unless the witness is served with a subpoena, they are under no legal obligation to attend court proceedings. Crown Counsel will often agree to subpoena witnesses who have provided a police statement and Crown Counsel does not intend to call in its case but defence counsel wants to have called. Other defence witnesses are typically known to the accused (such as alibi witnesses) and attend voluntarily. The defence/accused should obtain subpoenas for witnesses if they are important, not under Crown subpoena and not likely to attend voluntarily.

Witnesses must answer all questions put to them unless the information that Crown Counsel/defence is asking is legally privileged. Some examples of legal privilege are:

i) discussions between a client and their lawyer in situations when the lawyer was acting in a professional capacity;
ii) any information tending to reveal the identity of a confidential police informant, unless disclosure is the only way to establish the innocence of the accused; and
iii) communication between spouses.

b) *Preparing a Witness*

The Defence/accused should thoroughly prepare witnesses for trial. A witness must tell the truth as they know it, but prior rehearsal of possible questions and answers is advised. All answers should address the specific questions asked. Witnesses should be appropriately dressed.

c) *Testimony of Witness*

A witness is required either to swear an oath or to solemnly affirm that they will tell the truth. Section 16(3) of the *Canada Evidence Act* permits a witness who is able to communicate the evidence, but does not understand the nature of an oath or a solemn affirmation due to age (under 14 years) or insufficient mental capacity, to testify – as long as they promise to tell the truth.

The judge decides whether to admit or exclude evidence, as governed by the laws of evidence, case law, the *Charter*, the *BC Evidence Act*, the *Canada Evidence Act*, and the statute creating the offence. Evidence must be relevant to the facts in issue. The facts in issue are those that go to establishing the essential elements of the offence and any legal defence to that offence. Evidence may be presented with respect to other issues as well, such as the credibility of a witness, provided that the evidence does not offend the collateral evidence rule.

d) *Admission or Confession (to a person in authority)*

Where the accused has made a statement outside the trial, for example, while being questioned by the police (or a store detective, transit police, and other person in authority), the Crown may seek to use this statement,

- as evidence of an admission or confession by the accused, or
- for the purposes of cross-examination during trial.
-

There are two different kinds of statements: admissions and confessions.

1. An admission is a statement made to another civilian. It is generally admissible;
2. A confession is a statement made to a police officer (or person in authority), and there are very strict rules regarding the admission of such statements at trial.

Anything the accused says to the police before or after the arrest is admissible as a confession **only** if the Crown first proves it was made voluntarily. See **Section IX: Charter** below for more information on confessions.

e) *Leading a Witness*

Counsel is generally not permitted to lead its own witness (i.e., suggest answers), with the exception of preliminary matters such as the witness's identity, residence, age, and other matters that are not at issue, and that merely help to set the stage. However, **Leading questions are proper and encouraged for cross-examination.**

f) *Expert Opinion Evidence*

Opinion evidence is permitted where it assists the trier of fact to draw conclusions from the evidence. There are two types of opinion evidence: non-expert and expert. Non-expert opinion evidence is generally not permitted. Expert evidence is not permitted where the trier of fact is capable of reaching a conclusion without

such evidence. Expert opinions are necessary where the trier of fact would be unable to draw a conclusion with respect to the evidence. Experts must first be established as such – the determination is made in a *Voir Dire* (a trial within a trial). For a more complete explanation of the law on opinion evidence, see *R v Mohan* [1994] 2 SCR 9.

Section s 657.3(3), of the *Criminal Code*, imposes an obligation on the defence to disclose any expert opinion evidence it intends to call prior to trial. *R v Stone*, [1999] 2 SCR 290 sets out the guidelines which apply to both Crown and defence in disclosing expert opinion evidence.

11. Conclusion of the Trial

a) Closing Argument and Submissions

The defence/accused and the Crown will make closing arguments that summarize their view of the facts and the pertinent law. The judge or jury may then retire to consider a verdict. If the defence has called evidence, it must make submissions first. Often a case will be decided based on the credibility of the witnesses. If the accused takes the stand, then the case is likely to be a credibility issue, with rules as described in *R v W(D)*, above.

b) Verdict

If the Crown is able to prove each element of any of the offences charged beyond a reasonable doubt, there will be a guilty verdict. An accused can only be convicted of an offence that is on the Information; however, the accused may be convicted of:

- All, some, or one of the offences charged;
- A lesser included offence of an offence charged; and/or
- An attempt of an offence charged.

Crown can amend the Information to include new charges up until the close of Crown's case. Once the defence's case is called, no new charges can be added and applications to amend the Information will usually be denied.

c) Post-Conviction

There are certain arguments that can only be made post-conviction. One example of this is entrapment. In entrapment a conviction is entered but not recorded until the court determines whether or not allowing the conviction to stand would constitute an abuse of court process, because the commission of the offence was the result of police conduct which induced the accused to commit the offence.. See *R v Ahmad*, 2020 SCC 11 for more information.

d) Sentencing

The judge will sentence the accused after a conviction or guilty plea. However, the judge will ask for submissions on sentencing from both sides regarding the offence and the offender. The defence/accused and Crown should be prepared to address sentencing immediately following a trial. This is briefer than sentencing submissions for a guilty plea. Alternatively, the Crown or defence/accused may adjourn the matter for sentencing on application. But such an application will be granted only if there are valid reasons for counsel to ask for more time to prepare or if a pre-sentence report is requested.

Judges have broad discretion in imposing most sentences – depending on the specific offence, whether it is provincial or federal, and whether it is summary or indictable. See **Section VI: Resolving the Matter Prior to Trial**, above, for more information on types of sentences a judge can order.

VIII. OTHER ISSUES

A. Accused Suspects They May Be Charged with an Offence

An accused may have been stopped by the police or observed doing "something wrong," but has not yet received a summons. To see if one has been officially charged, they can contact the Vancouver police or the RCMP to see if a report to Crown Counsel has been made. It is also possible to check with the court clerk, the police, or the Crown Counsel office to see if an Information has been laid and forwarded to Crown Counsel. If there is an outstanding warrant for the person's arrest, the accused must turn themself in immediately. This is a critical time for an accused to learn and note their legal rights, including the right to remain silent.

B. Staying a Charge

Once the Information has been laid, the prosecution of the case is in the hands of the Crown. The Crown can only stay a charge if there is no substantial likelihood of conviction, or if it is not in the public interest to proceed with the charge.

A judge has no discretion in the decision of Crown Counsel to enter a stay of proceedings (*Criminal Code*, s 579). The Crown may enter a stay of proceedings either before or during the trial. See **Section VI: Resolving the Matter Prior to Trial**, above, for more information.

NOTE: At trial, the accused/defence may instead ask Crown to call a no-evidence motion rather than enter a stay of proceedings, in which case the accused is acquitted due to a lack of evidence. This decision is solely within the discretion of Crown Counsel. An acquittal is preferable to a stay of proceedings as the accused's record will be removed immediately rather than remain as a 'pending charge' for one year.

Any person who wishes to have a stay of proceedings entered should do so with the advice of a lawyer. Complainants should be careful with regards to what is said to Crown. If the complainant wishes to have the charges dropped, they should contact the Crown to discuss the matter. It is important to note that an accused person MUST NOT and CANNOT attempt to persuade the complainant to drop the charges, as to do is a criminal offence.

C. Appeal

The accused has a right to appeal a conviction or sentence or both. Appeals must be filed **within 30 days** of the sentence. An accused person who believes that they have a strong case for an appeal should be referred to the Lawyer Referral Service.

D. Default in Payment of Fine or Non-Compliance with Order

1. Provincial Offences

A convicted person may not be jailed for defaulting on payment of a fine, except as under the *Small Claims Act*, RSBC 1996, c 430 (*Offence Act*, s 82). Failure to pay a fine can result in the Crown obtaining a court Judgment Order by filing the conviction and entering

the amount of the fine. The order has the same effect as a judgment in a civil case. The Crown can collect the fine by a Garnishing Order, Warrant of Execution, or other means, just as a judgment would be enforced in a civil case.

2. *Federal Summary and Indictable Offences*

If a fine or a community work service is ordered, the court may grant more time for payment or completion of hours. This is granted when a person has a legitimate excuse for wanting an extension and makes a court application to extend the time.

E. *Criminal Records*

1. *What is a Criminal Record?*

The answer is not straightforward as different people will use the term "criminal record" to mean different things. Informally, a "criminal record" often refers to criminal convictions. This would include suspended sentences, fines imposed after criminal convictions and any form of incarceration such as house arrest (conditional sentence) or jail time. This would ***NOT*** include discharges, stays of proceedings or withdrawn charges.

A criminal record is also used to refer to the information contained in the Canadian Police Information Centre (CPIC). CPIC is a central computer database that links police from across Canada by allowing each department to enter and access information on a person's criminal history. Depending on the level, this would include the history of any criminal proceedings against a person. As a result, discharges, stays of proceedings, peace bonds and withdrawn charges may appear on a person's CPIC record until they are purged or suspended.

Individual police departments additionally keep a great deal of other information regarding a person's criminal history that is not entered into CPIC. This could include criminal charges outstanding against a person or complaints made to police.

2. *What Information Can a Third Party Find Out About?*

It is very important that people read and understand what they are signing when signing a consent to having their criminal record disclosed (i.e., expanded crim record check). Often employers will simply ask; "Do you have a criminal record?". However, "criminal records" can encompass suspended sentences, fines imposed after criminal convictions and any form of incarceration. In this case, all other information does not have to be disclosed. If a more thorough check is done, the information that is disclosed depends on the agreement signed by the individual. It should be noted that the *BC Human Rights Code*, RSBC 1996, c 210, s.13, makes it illegal to discriminate based on being convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

There are two types of criminal record checks: standard and vulnerable sector. There are 4 levels of standard criminal record checks - level 1 to 4. Criminal record checks can only be done with the consent of the individual. Only police agencies are authorized to conduct a criminal record check, with the exception of the BC Ministry of Public Safety and Solicitor General.

I. Level 1: Records of criminal convictions which have not been suspended following an application for a criminal record suspension.

II. Level 2: Level 1 + outstanding charges that the police force is aware of.

III. Level 3: Level 2 + records of discharges which have not been removed (all charges regardless of disposition).

IV. Level 4: Level 3 + check on local police databases, court and law enforcement agency databases (also known as "Police Record Check").
The vulnerable sector check includes a level 4 check plus any sexual offences and convictions which a records suspension was granted. A criminal record does not include convictions under provincial laws like under the *Motor Vehicle Act*, RSBC 1996, c 318.

3. How Will a Criminal Record Affect My Ability to Travel?

Each individual country controls entry to its territory and the impact of a criminal record will vary depending on where a person is trying to travel (and often the person working at customs). Canada and the US share a great deal of intelligence, such as CPIC, and American authorities will use this information when deciding whether or not to admit a person. A criminal conviction could be grounds to deny entry. While discharges are not convictions under Canadian law, American authorities do not make this distinction. Also, information that is purged from CPIC, which was accessed by the American database prior to it being purged from CPIC, may not be erased from American databases. Thus, a criminal history could affect a person's ability to travel, but the exact impact will depend entirely on the policies of the host country.

- Inadmissibility to the United States

  Admissibility to the U.S.A. is determined in accordance with the *Immigration and Nationality Act* (1952), Public Law No 82-414, 66 Stat 163) ["*INA*"]. Section 212(a)(2)(A) of the *INA* states that a person is inadmissible if they commit a crime involving "moral turpitude" (i.e., shocks the public conscience; see *Wing v United States* 46 f2d 755 (7th Cir 1931) for a detailed definition), or violates any law relating to a controlled substance (as defined in section 102 of the *Controlled Substances Act* (21 USC 802)). A person is also inadmissible to the United States if they commit two or more criminal offences whose convictions have an aggregate sentence of five years or more. Finally, an immigration officer can deny entry into the US if they have "reason to believe" that the individual has committed drug trafficking, prostitution, or money laundering offences.

NOTE: A conviction as defined in s 101(a)(48)(A) of the *INA* includes any form of punishment, penalty, or restraint of liberty, which is ordered by the court. This means that conditional discharges and suspended sentences would be considered convictions. Consult **Chapter 18: Immigration Law** for more information.

4. Elimination of Records

All youth convictions are sealed at the time the person turns 18 years old. However, if a person is found guilty of an adult Criminal Code offence within 3 years following the completion of a sentence for a criminal youth summary conviction offence or within 5 years of completion of a sentence for a criminal youth indictable offence then their youth record is re-opened and remains part of the person's permanent record under youth convictions.

The time calculation under this section of the *Youth Court Justice Act* is complicated. As such, occasionally, mistakes are made and if one sees a Youth Record as part of an accused's criminal record, the time requirements for re-opening that youth record should be double-checked.

5. Record Suspension

A record suspension (formerly a pardon) allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records. The waiting period is:

- 5 years (after the sentence is completed) for a summary offence (or a service offence under the *National Defence Act*).
- 10 years (after the sentence is completed) for an indictable offence (or a service offence under the *National Defence Act* for which you were fined more than $5,000, detained or imprisoned for more than 6 months).

Individuals convicted of sexual offences against minors (with certain exceptions) and those who have been convicted of *more* than three indictable offences, each with a sentence of two or more years, are ineligible for a record suspension.

As of June 2016, the Parole Board of Canada (PBC) charges $631 to process a record suspension application (certified cheque, bank draft or money order, payable to the Receiver General of Canada). The applicant is also responsible for additional fees related to getting the following: fingerprints, copy of their criminal record, court documents, and local police record checks.

IX. CRIMINAL LAW AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. Impact of the Charter

Procedural and substantive criminal law has been shaped and expanded by the *Charter* since its introduction in 1982. Consideration of sections 7 – 15 of the *Charter*, in addition to the remedial s 24, is required to properly understand the constitutional guarantees that profoundly influence criminal law.

A compilation of *Charter* decisions is available at the UBC Law Library, and includes decisions in such areas as arrest procedures, the right to counsel, the admissibility of illegally obtained evidence at trial, search and seizure, and the right to be presumed innocent until proven guilty.

The *Charter* provides for two types of sanctions. First, where a law is found to violate the *Charter*, section 52 of the *Constitution Act* applies to render the law "of no force or effect". Second, where an individual's right or freedom has been infringed upon, not by impugned legislation but by the acts of an agent for the state (e.g., the police), the aggrieved person may apply under s 24(1) of the *Charter* for an appropriate remedy. In the case of evidence obtained in contravention of the *Charter*, that evidence could be excluded by the operation of section 24(2).

Section 8 of the *Constitutional Question Act*, RSBC 1996, c 68 requires that 14 days' notice be given to opposing counsel where the constitutional validity of a law is challenged, or where an application is made for a constitutional remedy under section 24(1) of the *Charter*. **Note: To challenge legislation or seek a remedy under section 24(1) separate notice must be given to both provincial Crown Counsel and the federal government.** For an application to exclude evidence under section 24(2) of the *Charter* notice is typically given in the arraignment report. Note: notice to seek to exclude evidence under section 24(2) of the *Charter* is not required by the *Constitutional Question Act*, but a failure to alert the Crown in a timely manner to an application to exclude evidence under section 24(2) of the *Charter* has been met in a number of decisions with the court

applying its considerable powers to control its own processes against the party who failed to provide adequate notice.

B. Section 1 of the Charter

The *Canadian Charter of Rights and Freedoms*, enacted in 1982, changed criminal law so that an accused had constitutionally guaranteed rights that could not be infringed unless the government could show that such an infringement was demonstrably justified in a free and democratic society.

Section 1 of the *Charter* is often referred to as the "reasonable limits clause" because it is the section that can be used to justify a limitation on a person's *Charter* rights. *Charter* rights are not absolute and can be infringed if the Courts determine that the infringement is reasonably justified.

Section 1 arises in cases where a *Charter* infringement is being argued. In order for the *Charter* infringement to be justified, the government has to prove to a court that its actions satisfy the steps in a section 1 analysis. The standard of proof is the civil standard – on the balance of probabilities, which is not as difficult to prove as the criminal standard of beyond a reasonable doubt.

The *Oakes* Test is a legal test created by the Supreme Court of Canada in the case *R v Oakes*, [1986] 1 SCR 103. *R v Oakes* provided the Court with the opportunity to interpret the wording of section 1 of the Charter and to explain how section 1 would apply to a case. The result was the *Oakes* Test – a test that is used every time a *Charter* violation is found.

The *Oakes* Test sets out several criteria to determine if a violation can be justified under section 1:

1. There must be a sufficiently important objective to warrant the overriding of the *Charter* right;
2. There must be a rational connection between the objective (i.e., the policy) and the means chosen (i.e., the law);
3. The means chosen should constitute a minimal impairment of that Charter right; and
4. The harm done by the means chosen should be proportionate to the government's objective (e.g., the more harmful the violation, the more important the objective must be).

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C. Right to a Trial within a Reasonable Time: s 11(b)

Section 11 – Any person charged with an offence has the right: (b) to be tried within a reasonable time.

In addition to the right to make full answer and defence, any person "has the right to be tried within a reasonable time". The recent decision by the Supreme Court of Canada in *R v Jordan*, 2016 SCC 27, has addressed the issue of what constitutes a "reasonable time". *Jordan* created a presumptive ceiling, beyond which any delay is presumed to be unreasonable, of 18 months for matters proceeding in provincial courts, or 30 months for matters proceeding in superior courts.

The appropriate remedy for the State's breach of one's s. 11(b) rights is a judicial stay of proceedings arising from s. 24(1) of the *Charter*. One can make a *Charter* challenge for the breach of s. 11(b) under the *Constitutional Question Act*, RSBC 1996, c. 68, which requires that notice of this challenge be given to both Provincial and Federal prosecutors.

D. Finding Legal Counsel and Other Assistance Where Person is Arrested and Detained: s 10(b)

Section 10 – Right on arrest or detention: (b) to retain and instruct counsel without delay and to be informed of that right.

If an accused has been denied bail (detained), it is usually a sign that the offence is serious. Nevertheless, it is important to have some knowledge of *Charter* issues relating to arrest and detention.
Under section 10 of the *Charter,* everyone has the right on arrest or detention:

- to be informed promptly of the reasons for that arrest or detention;
- to be informed of the right to remain silent;
- to retain and instruct counsel without delay and to be informed of that right; and
- to be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel (*R v Brydges* [1990] 1 SCR 190).

The wording of the *Charter* suggests that the right to counsel is not absolute, but rather that it is available only to a person who is under arrest or in detention. The *Charter* right to counsel is thus triggered where a person is arrested or detained (see *R. v. Grant,* above).

Under s 10(b), the arresting officer has a duty to cease questioning or otherwise attempt to elicit evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel (*R v Manninen* [1987] 1 SCR 1233). The arrested person has both the right to Legal Aid counsel and the right to be informed of this right: see *R v Brydges* (add citation) and *R v Prosper* [1994] 3 SCR 236.

Issues may arise at trial when an accused gave a statement to the police or provided bodily samples of some sort. In such cases, defence counsel should seek to have the evidence excluded under section 24(2) of the *Charter*.

NOTE: *Brydges'* Line is a province-wide service that is available for arrested persons 24 hours a day, 7 days a week. A lawyer is always available to speak to the person for free.

NOTE: Detention under sections 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that they had no choice but to comply. See *R v Grant*, [2009] 2 SCR 353, for more details.

E. Lawful Arrest

Section 9 – Right not to be arbitrarily detained or imprisoned.

An unlawful arrest may vitiate the authority of a search or may be the basis of a *Charter* argument that the accused was arbitrarily detained contrary to s 9 of the *Charter*. This may result in exclusion of evidence such as items seized during the arrest.

1. Police Powers

The police may arrest without warrant any person who is committing a criminal offence of any type or who they believe on reasonable and probable grounds has committed or is about to commit an indictable offence (*Criminal Code*, s 495(1)). The police officer's belief must be more than a mere "suspicion".

Where the police believe on reasonable and probable grounds that a person has committed or is about to commit a summary offence, a hybrid offence, or an indictable offence listed in section 553 of the *Criminal Code*, that person cannot be arrested without warrant unless:
a) the public interest requires it; and

b) there are reasonable and probable grounds to believe that the person will fail to attend court (*Criminal Code*, s 495(2)).

"Public interest" includes the need to establish the person's identity, the need to secure and preserve evidence, and the need to prevent the continuation or repetition of an offence or the commission of another offence.

An accused who is not arrested should be released with an appearance notice. Note that there are instances where even though an arrest was unlawful, the person's detention will not be deemed arbitrary. See sections 8, 9, 10, and 11 of the *Charter* for relevant constitutional provisions.

Regular citizens also have a right to detain people they see committing a crime. Under s 494(1) of the *Criminal Code*, anyone can arrest a person without warrant if they find the person committing an indictable offence, have reasonable grounds to believe the person has committed an indictable offence, or if they see a person being pursued by anyone who has lawful authority to arrest the person. Section 494(2), meanwhile, gives store detectives the authority to arrest shoplifters. Under this section, a property owner or an agent working on the owner's behalf may arrest without warrant any person who is committing a criminal offence in relation to the owner's property.

2. *The Criminal Code: The Law of Arrest and Release*

Some of the relevant sections of the *Code* are:

a) ss 25 – 27: use of force, liability for excess force, use of force must be reasonably necessary;
b) ss 494 and 495: arrest without warrant by private citizen, police officers;
c) ss 496, 497, 498 and 499: appearance notice, release from custody;
d) s 501: appearance notice, promise to appear, recognizance;
e) ss 503 and 515: judicial interim release (bail);
f) ss 145, 498 and 510: failure to appear; and
g) ss 511 – 514: warrant to arrest.

Sections 7, 10, and 24 of the *Charter* have some measure of effect on arrest procedure, particularly in relation to the conduct of arresting officers and the admissibility of evidence: see *R. v. Stevens*, [1988] 1 S.C.R. 1153. There is also well-developed case law on arrest procedure. See *Christie v Leachinsky*, [1947] AC 573 (HL) and section 29 of the *Criminal Code*.

F. *Search and Seizure: s 8*

Section 8 – Right to be secure against unreasonable search and seizure.
A breach of an accused's rights against unreasonable search and seizure may result in the exclusion of evidence obtained during a search.

1. *Search of Premises, Vehicles, and Interception of Private Communications*

In general, police must have a search warrant to search a person's premises (see *R v Feeney*, [1997] 2 SCR 13). However, there are exceptions where exigent circumstances exist to allow warrantless searches.

If a person can establish a reasonable expectation of privacy over the area searched, then a valid search and seizure requires prior authorization by a Justice of the Peace, who must be satisfied that reasonable grounds exist to believe that an offence has been committed, and that evidence of that offence will be found in the place being searched.

As a general rule, a search of premises must be based on reasonable grounds. If a search is conducted merely on a suspicion, the search will likely constitute a violation of section 8 of the *Charter*. In the case of *R v Kokesch* [1990] 3 SCR 3, the search was held to be unreasonable even though a warrant had been issued, because the basis for the warrant was unreasonable and an unlawful search of the premises, based merely on suspicion. As a result, the search warrant was struck down and the search was deemed warrantless, and all items seized were excluded from the trial.

Practice Recommendation - Challenging a Search Warrant

To challenge a search warrant, the defence/accused should first seek disclosure of the Information to Obtain (ITO), which is the affidavit sworn in support of obtaining the search warrant.

There are three ways to attack the validity of an ITO:
1) Facially Invalid: If the contents of the ITO do not establish reasonable grounds to believe items relevant to an offence will likely be found in the search location, then an application may be made as a facial validity challenge to the ITO.
2) Facially Valid, but with insufficient factual grounding as the ITO does not reflect the true state of the police investigation at the time the ITO was drafted and those omissions or mistakes were material to the issuance of the warrant:
3) Facially Valid with Sufficient Grounds, but the police engaged in an abusive process in obtaining the ITO.

When assessing the ITO, first determine if the affidavits filed in support of the warrant establish reasonable grounds for searching the location, based on the contents of the ITO (assuming the contents are true). If the ITO on its face provides sufficient grounds to issue a warrant then the ITO must be compared to the information the police had available at the time they applied for the search warrant to assess whether the police made full, fair and frank disclosure of all material relevant to the request to search that location. The ITO as an ex-parte application should provide full, fair and frank disclosure of all material facts relevant to the police investigation and knowledge of the place searched at the time the ITO was sworn. If there are important errors or omissions in the facts stated in the ITO, then an application can be made to cross-examine the affiant of the ITO as a sub-facial challenge to the ITO, in an effort to show either that had the true state of affairs been disclosed in the ITO, the warrant would not have been issued or that the police intentionally misled the authorising justice.
See *R v Garofoli* [1990] 2 SCR 1421 and *R v Araujo* [2000] 2 SCR 992 for more information on challenging search warrants.

A warrantless search is presumed to be unreasonable and the onus is on the party seeking to justify the search and seizure to rebut this presumption: see *Hunter v Southam Inc*, [1984], 2 SCR 145. The Supreme Court, however, has recognised several situations where authorities may conduct a search without warrants – for example where evidence of the offence is in plain view, or where the occupant of the premises has consented to the search.

A search warrant authorizes the police to enter and search a specific location during a specific period of time and an occupant of the premises to be searched has a right to view the search warrant before the search is conducted. An occupant should check the address on the warrant and the time that the search is authorized to ensure that the warrant actually authorizes the search. Unless the warrant states that the police may enter and search a

specific address during the time the police arrive at the occupant's address then the occupant should point out to the police that the warrant is either not for the occupant's address or has expired and may refuse police access to the residence. If the police nonetheless insist on entering the location and searching it, there is little practically speaking that can be done to stop the search while it is occurring, there may however be a civil right of action against them in trespass and a strong argument in any subsequent criminal case that any items seized should be excluded from evidence.

2. Search after Valid Arrest and Search of Person

At common law, upon a lawful arrest, an officer acquires an attendant right to search for officer safety and evidence (see *R v Klimchuk*, [1991] 67 CCC (3d) 385 (BCCA)). (Please review the section on **Lawful Arrest** above). Note: Such a search requires a lawful arrest and is subject to a challenge if the arrest was not lawful. (See *Section E* on *Lawful Arrest*).

Where no arrest has taken place, a peace officer may also acquire a more limited right to search for officer safety. If an officer has reasonable grounds to suspect that an individual has a specific connection to a crime and detains that individual for further investigation, then incidental to this investigative detention, the officer may engage in a limited pat-down search confined in scope to locate weapons; see *R v Mann*, [2004] 3 SCR 59.

For more information on searches of the person, see *R v Debot* [1989] 2 SCR 1140, *R v Ferris* [1998] BCJ No 1415 (CA), and *R v Simmons* [1988] 2 SCR 495.

G. Right to Remain Silent: s 7

Section 7 – Right to life, liberty, and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice ("fundamental justice" includes the ability to make a full answer and defence, the right to silence, and the right to a fair trial, meaning that there is a right to Crown disclosure).

1. General Right of Silence

There is a basic right to remain silent when encountering police officers that applies before and after arrest. A police officer has no right to take a person to the police station for questioning unless that person has been arrested or goes voluntarily.

An accused has the right to remain silent when questioned after arrest. This silence cannot be used in court to imply guilt – an accused is protected from self-incrimination by silence. The police must inform the accused of the right to remain silent and that anything they do say may be used as evidence.

An accused should be further advised that **when they are being questioned any conversation with police can only hurt them.** Police will usually ask the accused for "their side of the story". What police are looking to obtain are admissions like "I was there, but I didn't do that". This would be a confession that the accused was present at the scene, which the Crown may not otherwise be able to prove.

It is best for an accused to say nothing to the police until after consulting a lawyer. This applies even when an accused plans to plead guilty, because there may be a valid defence to the charge that the accused does not know about. For further information, see *R v Hebert* [1990] 2 SCR 151.

2. *The Modern Confessions Rule: Oickle*

The modern confessions rule is outlined in *R v Oickle* [2000] 2 SCR 3. A confession or admission to a police officer (or other authority figure like transit police or private security officers) by an accused will not admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness. The burden of proving the voluntariness of a confession falls on the Crown to prove beyond a reasonable doubt. However, if it appears that the Crown can satisfy that burden, the accused should consider calling evidence regarding the voluntariness of the confession so as to cast doubt on the voluntariness of that confession.

When arguing that a confession was not voluntary, consider the following:

a) **Threats or promises**: fear of prejudice (if the accused was told "it would be better to confess") or hope of advantage (this does not have to be aimed at the accused, but can entail promises of reducing the charges);
b) **Oppression**: this includes subjecting the accused to inhumane conditions, depriving them of food, clothing, water, sleep, medical attention, counsel, or prolonged intimidating questioning;
c) **Operating mind**: whether the accused knew what they were saying and that it could be used against them; and
d) **Other police trickery:** police may be persistent and accusatorial but not hostile, aggressive and intimidating to the point where the community may be shocked by police actions.

3. *Exceptions to the General Right of Silence*

a) *Motor Vehicle Drivers*

Pursuant to section 73 of the *Motor Vehicle Act*, the driver (not passenger) of a motor vehicle must stop when asked to do so by a readily identifiable police officer and give their name and address and that of the vehicle's owner.

b) *Pedestrian Offence*

A person who commits a pedestrian offence must state their name and address when asked by a police officer or that person may be subject to arrest (City of Vancouver, By-law No 2849, *Street and Traffic By-law* (10 May 2005)).

The decision of the Supreme Court of Canada in *Moore v The Queen* [1979] 1 SCR 195 suggests that the same is true for offences committed while riding a bicycle. While the police have no power to arrest a person for this type of summary conviction offence, the police may do so lawfully if it is necessary to establish the identity of the accused.

c) *Federal Statutes*

Various federal statutes have provisions requiring that questions be answered: see *Canada Evidence Act*; *BC Evidence Act*, RSBC 1996 c 124; *Excise Act*, RSC 1985, c E-13; *Income Tax Act*; *Immigration and Refugee Protection Act*, SC 2001, c 27; and *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

4. *Exception to Right Against Self-Incrimination: Breathalyser Sample*

Where a police officer, on reasonable and probable grounds, believes a person has alcohol or drugs in their system, that officer may require a sample of breath to be produced. A

person who refuses to comply with a valid breath demand without a reasonable excuse for refusing may face criminal charges for failure to provide a breath sample. See **Chapter 13: Motor Vehicle Law** for more information.

D. Admission of Evidence Obtained in Contravention of the Charter s. (24(2))

It is good practice to advise the Crown ahead of time before making a *Charter* argument. In the *Charter* notice, the accused should provide the Crown with sufficient particulars of the argument, including the alleged breach, the remedy sought, and the witnesses required for the application (*Voir Dire*). Cite cases on which the accused intends to rely.

Section 24 – (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Section 24 of the *Canadian Charter of Rights and Freedoms* provides remedies to those whose *Charter* rights have been violated. The burden lies on the applicant to establish a *Charter* violation. The standard is based on a balance of probabilities. Once the *Charter* violation is proven, the focus shifts on matters concerning the possible effects on the fairness of the trial if the evidence was admitted. The three factors to be balanced in order to determine if the evidence should be excluded are i) the seriousness of the *Charter* infringing state conduct, ii) the impact of the *Charter* breach on the accused's interest, and iii) society's interest on the adjudication of the case on its merits (*R v Grant* [2009] 2 SCR 353). The burden is on the accused to establish on a balance of probabilities that evidence should be excluded under section 24(2). See *R v Harrison* 2009 SCC 34 for more information on the section 24(2) test.

The type of remedy a court gives normally depends on the type of government action that violates the Charter. If a government official took the action – for example, a police officer conducted an unreasonable search – the court will give an individual remedy that only applies to the person whose rights were breached (i.e., the court may say that the drugs found during the illegal search cannot be used as evidence in the criminal trial. This helps the accused person, but it doesn't change the law for anyone else). In other cases, the court may be able to do something else, like stop a prosecution (a judicial stay of proceedings), order one side to pay the other side's legal costs, or declare that certain rights were violated.

1. Other Charter Remedies Obtained through S. 24(1)

S. 24(1) permits a court to craft any remedy it considers appropriate and just in the circumstances. One commonly sought remedy is a judicial stay of proceedings under s. 24(1) for an abuse of process. Such a remedy is rare, however, and is only provided in the clearest of cases. Recent case law has somewhat reinvigorated the doctrine of abuse of process and examined the potential for alternate remedies to judicial stays of proceedings where police conduct was abusive. See for example *R v. Hart* 2014 SCC 52. For more in-depth information on s. 24(1), it is highly recommended that legal advice be sought.

V. LSLAP POLICIES

A. *Who LSLAP Can Help*

LSLAP can help with many criminal matters, but there are restrictions. We can assist the following people:

1. people who **do not** have a serious criminal record;
2. when the Crown is **not** seeking jail time;
3. people who are charged with an **adult** summary conviction offence or hybrid offence where the Crown is proceeding summarily;
4. people who are classified as low-income, determined on a case-by-case basis;
5. people whose cases are being tried in Provincial Court (not Supreme Court or Federal Court); and
6. people whose trial dates are 3 months away or longer.

It is important to note that all cases are contingent on the approval of LSLAP's supervising lawyer. For trials, LSLAP is only able to help if the student is able to secure a volunteer supervising lawyer for the trial.

B. *What We Can Do for Our Clients*

1. *If the Client Meets LSLAP Requirements*

LSLAP clinicians may provide assistance to clients including:

- helping the accused obtain particulars and set trial dates;
- representing an accused at trial for some summary offences with supervision, and/or speaking to sentence for such offences;
- contacting and negotiating with the Crown, in some cases, to agree in advance to a disposition favourable to the client; and
- applying for a diversion or peace bond for the client.

2. *If the Client Does Not Meet LSLAP Requirements*

LSLAP clinicians may assist the client solely by providing the client with a referral. No advice should be given. If the client wishes to review a decision denying Legal Aid, LSLAP may be able to assist with this review (see number 4(c), below).

3. *What to Do if LSLAP Cannot Represent a Client*

Clients should be encouraged to find counsel as quickly as possible. If an accused must appear in court and has not yet found counsel, they should ask for an adjournment. It is common for the court to allow an adjournment for several weeks to permit the accused to obtain counsel after the first appearance.

VI. INFORMATION FOR LSLAP STUDENTS

A. *Determine the Status of the File*

When a client comes into the clinic and informs a clinician that they must appear in court, the first thing to do is determine the nature of the next appearance.

1. Client Comes to the Clinic Before the First Appearance Date

The clinician should first advise the client they must attend court at each appearance date. The clinician should further advise the client about the nature of the first appearance and tell the client that the trial **never** proceeds at that time. If the time before the first appearance date is brief (one week or less), the client should be advised not to enter a plea, but to ask for a two-week adjournment to find counsel, to seek further legal advice, or to prepare their case. The clinician should assess the possible options for legal counsel and give general advice. They should **not** get into the client's version of the events that led to the criminal charge until particulars are obtained and they have met with the supervising lawyer.

If the complainant and the accused both seek advice from LSLAP, the student must be aware that this is a serious conflict of interest. The second party must seek independent advice even if the complainant and accused are husband and wife. Under no circumstances should counsel for the accused advise the complainant or vice versa. If the other party approaches LSLAP for advice, they must be immediately referred to their own legal counsel.

2. Client is on Probation or Otherwise Serving a Sentence

The student may be able to help the client understand the terms of a sentence, or help the client in their relationship with the supervising authority. If the issue for which the client is seeking advice is complex, the client should be advised to seek legal counsel.

3. Client Has Already Appeared in Court

If the client has only appeared in court once, they have likely already been granted an adjournment to retain counsel. If the client has appeared in court on a number of occasions, the Justice of the Peace (JP) might not grant another adjournment, and a trial date may be set at the next appearance. A judge, however, has discretion to allow further adjournments when there are extenuating circumstances, like LSLAP black-out dates.

If the client has already obtained particulars and the Initial Sentencing Position, and the clinician needs time to review the particulars and to discuss the client's options, the client should be instructed to attend the Initial Appearance and inform Crown that they are being represented and ask that the matter be adjourned for one to two weeks. The client may also request an adjournment if there are significant outstanding disclosure issues.

4. The Trial has Already Been Set

LSLAP cannot represent a client unless the trial is more than 3 months away. If the trial date is sooner, the clinician can advise the client to ask for an adjournment of the trial to a later date. This can be done at the Trial Confirmation Hearing or earlier. If the adjournment is not granted, the clinician should tell the client that LSLAP cannot represent them and it is their responsibility to seek other counsel.

NOTE: Several pamphlets available from the Legal Services Society may help a client prepare for their own trial. These include: "Representing Yourself in a Criminal Trial," "Speaking to the Judge Before you are Sentenced," and "If you are Charged with a Crime".

Practice Recommendation - File Intake

Important: Once LSLAP has agreed to represent a client, it is always wise to confirm the exact details of the client's next court appearance – date, time, courtroom, and what stage the matter is currently at.

If the client has provided the clinician with their particulars, LSLAP will have their file number. You can access their information on the B.C. Ministry of Attorney General website. Go to www.gov.bc.ca/ag and follow the 'Court Services Online' link. This site allows you to look up your client by name and it will show all of their provincial court appearances, the nature of the next appearance, the date and time, and what courtroom it is in. Alternatively, you can call the registry (or Crown) at the particular courthouse and ask when the next court date is, and what is set to happen on that date.

Common Courtrooms

Jurisdiction	First Appearance Court (Judge/JP)	Arraignment / Plea Court (Judge/JP)
Vancouver	307	101
Vancouver DCC	1	1
Surrey	100/104	102 (Prov) / 103 (Fed)
North Vancouver	003	002
Richmond	101	106
New Westminster	IAR	2-6
Port Coquitlam	003	001

Practice Recommendations - File Intake (Continued)

Vancouver's Downtown Community Court (DCC)

The DCC differs from normal criminal courts in that it integrates a variety of agencies to address the underlying health and social problems that often lead to the commission of an offence.

The DCC only has jurisdiction to take summary conviction cases where the offence occurred in Downtown Vancouver (with Clark Drive and Stanley Park as the east-west boundary; and Coal Harbour and Great Northern Way as the north-south boundary).

Drug Treatment Court Vancouver (DTCV)

The goal of the Drug Court program is to reduce drug use in adults charged with offences motivated by drug addiction problems. Individuals charged under the *Controlled Drugs & Substance Abuse Act* and other drug-motivated *Criminal Code* offences are eligible for the drug treatment court program. In exchange for less severe sentences, offenders plead guilty and participate in a supervised drug treatment program, which includes individual and group counselling and social activities.

5. *Client Failed to Appear*

Failure to appear for a scheduled court appearance is an offence (*Criminal Code*, ss 145(4) and (5)) usually punishable by summary conviction. If the client did not appear, there is probably a bench warrant out for their arrest. This can be verified online on the CSO website (see box above for link). The client must be advised to report to the courthouse and apply to "vacate the warrant". The client must be advised to turn themselves in immediately.

B. *Discuss LSLAP File Procedures and Policies with the Client*

The clinician must establish certain "ground rules" to govern the relationship between clinician and client in a criminal file:

1. The client will attend all court appearances. LSLAP clinicians will not appear as agents for their clients.
2. Counsel represents the client and, as such, it is the clinician who is in charge of the file. While the client may assist in their own defence and can give the clinician specific instructions, it is the clinician who contacts Crown and other parties.
3. The client cannot request another law student; the client can either be represented by the clinician they are assigned, or they can seek alternate representation outside of LSLAP.
4. Clinicians cannot follow illegal or unethical instructions, such as tampering with witnesses or counselling a Crown witness not to attend court. Clinicians also cannot put the client on the stand knowing that the client will be untruthful and commit perjury. Students should be advised to speak to a supervising lawyer if there are any emerging ethical concerns.

VII. ETIQUETTE FOR LAW STUDENTS

A. Courtroom Etiquette for Law Students

When attending court for a matter, the student should check the court lists to confirm which courtroom the matter is to be heard in. If the court is not sitting at the time, the student should attempt to seek out the Crown Counsel who has conduct of the matter and identify themselves.

In order to get the client's matter called, the student should indicate to Crown Counsel or the Crown assistant that both the client and counsel are present and ready to proceed. Crown Counsel will proceed with the shortest matters first; priority will also be given to matters for which the accused **and their counsel** are present. Do not interrupt Crown Counsel when they are addressing a matter.

When the judge enters or exits the court, the student should rise and bow to the judge.

If the court is sitting, the student should enter the courtroom, bow to the judge at the door and/or the bar of the court, and be seated at the chairs located beyond the bar. The client should sit in the gallery behind the bar.

When the matter is called, the student should rise and approach the counsel's table. The student should stand on the other side of the podium from the Crown. The rule of thumb is that Crown is seated next to the witness box while defence is seated furthest away.

The student should invite the client to come forward and address the court in a loud, clear voice, keeping in mind that the microphones in most courtrooms are only for recording and not for amplification purposes. The student should introduce themselves in the following manner:

> "Your Honour, my name is <Full Name><Spell Out Last Name>, first initial <First Initial>. My pronouns are <pronouns>.I am a law student with the Law Students' Legal Advice Program, and with leave of the Court, representing Mr./Ms. _______ who is here in the court today". <Have the client stand up and point towards them>

NOTE: Judges are addressed as "Your Honour" in court while JPs are addressed as "Your Worship."

If there is a supervising lawyer present, they **must** be introduced as well at this time. The student should then remind the court what is to occur with the file (e.g., the matter is set for an arraignment hearing or disposition or trial, etc.).

Upon completion of the student's appearance, on exiting the courtroom the student should turn and bow to the judge at the bar of the court and/or the door.

1. Interacting with Crown

When interacting with the Crown (or anyone else for that matter), students should always be pleasant and polite. They are people a student will continue to work with for many years. There are times when students need to be more assertive but this should be done in a tactful way. Students should always respect the Crown, even when pointing out errors. Clinicians should be firm, but polite.

2. Courtroom Demeanour and Etiquette

- Review Section III "Etiquette" for general recommendations on courtroom etiquette.

VIII. PRACTICE RECOMMENDATIONS FOR LAW STUDENTS

Practice Recommendation - Ensuring the Crown Can Prove Its Case

Prior to asking an accused what happened from their perspective, some counsel want to review the nature and character of the charges and the possible defences with the accused. Even if the client admits their guilt, an accused must be advised regarding the strength of the Crown's case. A criminal defence lawyer has an ethical obligation to pursue any viable defence, even if only as a negotiation tactic. There is nothing unethical about running a trial with regards to a client who admits their guilt, as long as the clinician is not misleading the court and the client does not take the stand to testify.

Practice Recommendation - Explaining a Client's Options

Be very sure that the accused understands exactly what they are pleading to, and the consequences of their plea. Also, be very sure that the accused understands that it is ultimately their decision as to which option to apply. Ensure that the accused person understands the consequences and risks of going to trial, any possible defence they may have and the difficulties in raising such a defence.

Students must never force an accused person to choose a particular option, particularly one where the accused is required to admit guilt. **It is always the client who ultimately decides the course of action they wish to follow.**

The accused may ask the student what they should do or what option they should take. The student should always remind the client that the choice is up to them, and refrain from telling the client what to do. Explain the options open to the client again and review the risks and consequences facing the client for each option. However, the student must not counsel a client to plead guilty unless they are actually guilty **AND** the Crown can prove its case beyond a reasonable doubt.

In explaining the student's assessment of whether Crown can prove its case beyond a reasonable doubt the student should never give clients "odds" or their chances of winning an acquittal. Rather, students should point out the possible defences available to the client and the difficulties, if any, of arguing such a defence.

Common Ethical Situations Arising in Assisting a Client with their Options

In certain circumstances, the course of action the client wants to take may render the student unable to represent the client, for example, if the client insists on illegal or unethical instructions, or where the client wishes to plead guilty for convenience. Some examples of this are as follows:

"I didn't do it, but I want to plead guilty because this is taking too much time away from my job, and it is just more convenient if I plead guilty."

Students have an ethical duty to ensure that the innocent do not plead guilty. Particularly, students cannot represent clients in cases where they wish to plead guilty for the purposes of convenience, not because they actually admit guilt.

"What if my wife/girlfriend/husband/boyfriend (complainant) doesn't come to testify?"

At this point in time, the accused may ask what would happen if the complainant does not attend court to testify, even if summoned. Inform the accused that if the key witness does not attend at court, Crown may stay the charges against the client. **If a Crown witness wishes not to attend to testify, they should obtain independent legal advice**. If any witness has been summoned and fails to attend to a summons, they can be arrested and even jailed. In addition, **the accused should be advised that if they tell a witness not to attend court to testify, they would be committing the criminal offence of obstructing justice (***Criminal Code*, s 139).

Practice Recommendation - Contacting Crown Witnesses

If, while preparing for trial, the defence must contact a Crown witness for whatever reason, the defence must be extremely careful in its approach and speak to a supervising lawyer before contacting the witness.

There is no property in a witness and the defence may contact Crown witnesses. However, the witness is not required to speak with the defence and this must be made clear to the Crown witness.

It should also be made clear to the Crown witness that the law student is representing the client, and as such may be in conflict with the witness' interests, and is in no position to provide the witness with legal advice.

If a student chooses to interview a Crown witness, they should **never do so alone**. Another student should attend and should take notes of the conversation in case a dispute develops about what was said in the interview or the circumstances in which the interview took place. The witness may be required to give evidence as to what happened. If interviewing the Crown witness by telephone, a witness should be present via conference call or speakerphone.

The student must be careful to avoid any appearance of impropriety or witness tampering, and **must never, either explicitly or implicitly, advise a Crown witness to not attend court when summoned.**

Note: if there is a no-contact order in place, the clinician can contact the witness only to discuss the trial, but the client cannot.

1. Challenging the Admissibility of Evidence

Prior to the trial commencing one should have reviewed the key evidence in the case and identified potential challenges to the admissibility of that evidence. One should consider if the admissibility issue or *Charter* challenge to the evidence can be canvassed with Crown counsel prior to the start of a trial. Generally, unless there is a good strategic reason to not inform Crown counsel, (i.e., informing the Crown will allow it to call additional evidence that the defence knows is available, but is not currently being called) admissibility issues should be brought to the Crown's attention ahead of time.

Challenging the admissibility of evidence is perhaps the most important work that the defence can perform as an advocate for the client, as lay litigants are ill-equipped to recognize and challenge inadmissible evidence. Rules of admissibility of evidence tend to be complex issues that require a critical analysis of the law followed by an application of the law to the facts. Diligent preparation would allow the student to present challenges to the admissibility of evidence and have inadmissible evidence excluded from the court's consideration. Some challenges to the admissibility of evidence are simply made through objections and legal arguments at the time Crown seeks to adduce the evidence, while others will require the court to hear additional evidence that is relevant to its admissibility.

2. Setting the Trial Date

LSLAP clinicians are encouraged to, but are not required to, appear in court to set a trial date. The trial date must be set with the approval of the supervising lawyer and according to LSLAP's trial availability. Before attending court to set a trial date, confirm the length of time needed by the defence with the LSLAP supervising lawyer.

NOTE: The client **must** still attend the Arraignment Hearing and enter a plea of not guilty in order for the trial date to be set.

3. Pre-Trial Conference (PTC)

The **pre-trial conference** is a procedural appearance for LSLAP files to confirm there is a trial supervising lawyer and that the matter is indeed going to trial, that there are no disclosure issues, and that *Charter* challenge notices have been given.

The clinician is encouraged to, but need not attend the PTC. Clinicians are reminded that they must give notice of any *Charter* challenges **at least 14 days** prior to the trial date. In addition, **a trial supervising lawyer must be confirmed by the PTC in order for LSLAP to confirm the trial date**.

It can be many months between the fixing of a trial date and the trial. The clinician must endeavour to remain in contact with the client during this long time period. LSLAP requires that the clinician contact the client **2 weeks** before the PTC to make sure the contact information has not changed and that the client knows when to appear in court.

If the clinician is unable to get in contact with the client before the PTC, the clinician must either appear at the PTC or formally withdraw from the record by sending a letter to the court registry and Crown as well as the client. If both the student and the client attend the PTC, the student should obtain new contact information from the client. If the client does not attend the PTC, the student must formally withdraw from the record at that time. The student should **never** disclose that there have been attempts to contact the client, or when the last contact was, as this is privileged information and would constitute a breach of solicitor-client privilege. Even when a judge asks for this information, it is ethical practice to politely tell the judge that the information is privileged. The clinician must then mail a letter to the client's last known address to inform them of the situation.

NOTE: In some cases, a clinician will be transferred a file after the PTC date, and find themselves unable to get in contact with the client. The LSLAP Executive and the Supervising Lawyer must deal with these files on a case-by-case basis.

APPENDIX INDEX

A. SAMPLE INITIAL SENTENCING POSITION
B. SAMPLE INFORMATION
C. DIVERSION APPLICATION AND SAMPLE LETTER
D. HOW TO PREPARE FOR AND CONDUCT A SENTENCING HEARING
E. TRIAL BOOKS
F. GLOSSARY OF TERMS

A. SAMPLE INITIAL SENTENCING POSITION

Crown Counsel's Initial Sentencing Position

ACCUSED: JOHN DOE Court File # 12345-1K

Crown Counsel's initial position on sentencing is based on an early guilty plea (a plea entered prior to the setting of a preliminary or trial date) to:

- ☑ All counts on the information
- ☐ The following counts on the information:

The initial sentencing position presented here has been derived by determining, on the information available to Crown Counsel, the appropriate sentence for the above count or counts based on an early guilty plea.

Crown Counsel's initial position on sentencing is subject to:

- any further substantive offences or breaches of court orders;
- any further information received; discussions with defence counsel or the accused; evidence provided in any type of hearing.

Crown Counsel will present the Crown's position on sentence to the Judge. The Judge will decide the sentence.

Crown is seeking all items checked off below:

☐ **Further information before determining the Crown's sentencing position.**

☑ Conditional Discharge

☐ Suspended Sentence

☐ Fine

☐ Restitution

☐ Driving Prohibition

☐ Firearms Prohibition and Forfeiture Order

☐ Jail

☐ Jail: Conditional Sentence

☐ Further information is required prior to determining Crown's position on how the sentence should be served

☑ PROBATION

- No Go } Ms. Doe
- No Contact } Ms. Doe
- Counselling as directed
- Community Work Service 20 hrs

CROWN: Mr. Bird DATE: 11 July 2013

PROVIDED TO: ☑ *Defence* ☐ *Accused* DATE: 15 July 2013

OPC 7530863033 (25/PAK)
(Rev. 2000/06)

C. SAMPLE INFORMATION

INFORMATION / DÉNONCIATION

Court Identifier:	[redacted]
Court File Number:	[redacted]
Type Reference:	K
Inf. Seq Number:	1
Agency File Number	[redacted]
DNA: [x] SOR: [ ]	K File: [x]

CANADA:
PROVINCE OF BRITISH COLUMBIA
PROVINCE DE LA COLOMBIE-BRITANNIQUE

This is the information of / Les présentes constituent la dénonciation de[redacted]a / un(e) **Court Liaison Officer** (the "Informant" / le "Dénonciateur") of / de **Maple Ridge**, British Columbia / Colombie-Britannique.

The informant says that the informant has reasonable and probable grounds to believe and does believe that / Le dénonciateur déclare qu'il a des motifs raisonnables et probables et croit effectivement que

Count 1

[redacted]on or about the 13th day of October, 2019, at or near Maple Ridge, in the Province of British Columbia, in committing an assault of[redacted]did use a weapon, contrary to Section 267(a) of the Criminal Code.

Count 2

[redacted] on or about the 13th day of October, 2019, at or near Maple Ridge, in the Province of British Columbia, did commit an assault of[redacted] contrary to Section 266 of the Criminal Code.

Count 3

[redacted]on or about the 13th day of October, 2019, at or near Maple Ridge, in the Province of British Columbia, did knowingly utter or convey a threat to[redacted]o cause death or bodily harm t[redacted]and members of her family, contrary to Section 264.1(1)(a) of the Criminal Code.

THE INFORMATION SWORN ON **OCTOBER 16, 2019** CONTAINS A TOTAL OF 3 COUNTS ON 1 PAGE.

SWORN BEFORE ME / ASSERMENTÉ DEVANT MOI
ON / CE **16TH** DAY OF / JOUR DE **OCTOBER, 2019**
AT / Á **PORT COQUITLAM**
BRITISH COLUMBIA / COLOMBIE-BRITANNIQUE

[redacted]019.10.16 15:04:06
07'00'

A JUSTICE OF THE PEACE IN AND FOR THE
PROVINCE OF BRITISH COLUMBIA /
UN JUGE DE PAIX DANS ET POUR LA
PROVINCE DE LA COLOMBIE-BRITANNIQUE

other signer - 4
Wed Oct 16 2019 15:03:56[redacted]

SIGNATURE OF INFORMANT /
SIGNATURE DU DÉNONCIATEUR

[redacted] **Arrested without Warrant**
PROCESS / ACTE DE PROCÉDURE

[redacted]2019.10.16 15:04:20
-07'00'

A JUSTICE OF THE PEACE IN AND FOR THE
PROVINCE OF BRITISH COLUMBIA /
UN JUGE DE PAIX DANS ET POUR LA
PROVINCE DE LA COLOMBIE-BRITANNIQUE

16-OCT-2019 3:04PM

Page 1 of 1

D. DIVERSION APPLICATION AND SAMPLE LETTER

LAW COURTS EDUCATION SOCIETY B.C.

Alternative Measures
(Diversion)

> You should get legal advice before you do anything in court. You can often get advice from **duty counsel** (a Legal Aid lawyer at the courthouse). Tell the sheriff you want to speak to duty counsel.

If you are charged with a crime and you admit that you committed the crime, you may be able to deal with the charges without having to plead guilty or go to trial. You may be eligible for **alternative measures** (also known as "diversion"), which is a program of community supervision by a Probation Office.

If you wish to apply for diversion, please consider using the attached form. Try to have a lawyer review this before you submit it to the Crown.

Crown Counsel may agree to diversion if:

- the crime was not serious,
- you have no criminal record (or only a very minor record from a long time ago),
- you committed the offence, admit guilt, and take responsibility for your actions, and
- you are remorseful and willing to take steps so that you do not return to the court with new charges.

> If you are Aboriginal, there are special diversion programs available to you. Ask courthouse staff where you can go for more information.

If Crown Counsel agrees to consider diversion, you will be asked to attend an interview to discuss whether you are a good candidate for diversion and what will be expected of you. In a diversion contract, you may be required to do any or all of the following things:

- write a letter of apology
- go for counselling
- do some community work service

You will have to complete these things within three months of agreeing to the contract. If you successfully complete your diversion contract, the Crown will "stay" your charge in court. This means you will not have a criminal conviction. However, the Crown, the Probation Office, and the police will know you have been "diverted" if you are ever charged with a crime again.

Funded by Justice Canada
Printed March 2002

Alternative Measures
(Diversion)

(*please fill out this form and give it to the Crown)

Facts:

Name ______________________________ Today's date ____________

Court file # ________________ Charge ____________________________

Next court date ______________ Court _____________________________

Offence date ________________ Where offence took place ______________

Address (where mail can be sent) ______________________________________

____

Phone number (where you can get calls) _________________________________

Personal history:

Birthplace ______________________________ Birthdate ______________

Immigration status _______________________ Aboriginal ❑yes ❑no

First language ______________ Where raised __________________________

Marital status ______________ Years together _________

Employed (where, and for how long) ____________________________________

Will a criminal record affect your job? ❑yes ❑no

In what way? ____

____

of people you support ________ Education completed __________________

Associations and/or interests (list) ____________________________________

____

Funded by Justice Canada
Printed March 2002

(OVER)

Health:

History of substance abuse ❑yes ❑no

Treatment history ____

____

Date started ____________ Date completed ____________

Health issues/disabilities ____

____

In counselling ❑yes ❑no Currently under a doctor's care ❑yes ❑ no

Currently on medication (list) ____

____

Other information:

Why did you commit the offence? ____

____

____

Do you regret your actions? ____

____

____

What was your mental/physical state when the offence was committed? ____________

____

____

List anything else about what happened that would help determine whether you should be considered for diversion ____

____

____

____

____

(use another sheet of paper if necessary)

E. SAMPLE DIVERSION LETTER

12 January 2013
<u>By Fax</u>
Crown Counsel
Provincial Court
Court Address Location

<u>WITHOUT PREJUDICE</u>

Dear Crown Counsel,
Re: B. Bird
Court File Number: 12345
Next Court Date: March 13, 2013, Courtroom 2
<u>Request for Diversion</u>

My client, Mr. Bird, has instructed me that he wishes to apply for diversion. Mr. Bird admits all essential elements of the theft and advises me he is extremely remorseful.

<u>Mr. Bird's Background</u>

Mr. Bird is 42 years old and resides at 123 Sesame St. He was born on November 10, 1969. Mr. Bird is separated from his wife, with whom he has one four-year-old son. Mr. Bird completed a post-secondary degree in Children's Media at Greater Sesame University.

Mr. Bird has been involved in non-profit work for the past twenty years. At the time of the incident, he was working with the Twelve Steps Program at the Sesame Care Facility as a social worker. He worked there from March 2011-November 2011, where he provided day-to-day monitoring and support for federal offenders on day parole. He is also employed as a social worker at the Sesame Village Neighbourhood House. Prior to these positions, Mr. Bird worked for Bert & Ernie's from 2003-2007, and for Von Count Accounting from 2007-2011. Due to his stress and injuries, he is no longer employed at the Sesame Care Facility; however, he continues to do casual work for Sesame Village Neighbourhood House. He has been on Employment Insurance for two months.

Mr. Bird suffers from a number of mental health issues including depression, anxiety and panic disorders and is currently under a doctors' care at Sesame Narrows Community Health Centre. At the time of the incident, he was taking Effexor and Clonazepam to treat these conditions. Although Mr. Bird continues to take medication his doctors are aware of the incident and the issue of whether the medication and/or the dosage may have been a contributing factor. Mr. Bird attends Sesame Narrows Community Health Centre for counselling and treatment on a regular basis and advises me he is stable on his current levels of medication.

<u>Circumstances of the Offence</u>

On March 13th, 2012, Mr. Bird stole a pair of shoes from Oscar's Footwear Emporium. He had a job interview requiring formal shoes, which he felt he could not afford. He experienced extreme anxiety with regards to his financial situation and lack of clothes appropriate for a job interview, and he suffered a panic attack with respect to concerns over his dress. Unfortunately, Mr. Bird decided to steal the shoes instead of paying for them. Mr. Bird is extremely embarrassed and sincerely regrets this decision. He also sincerely regrets his actions with regards to the store detective. He acknowledges they were completely inappropriate and he would appreciate the opportunity to write a letter of apology.

Mr. Bird attributes his actions to his anxiety condition. He is nonetheless aware of how inappropriate it was, and he is experiencing sincere remorse. Mr. Bird has never been convicted, nor even charged with an offence in the past, and he is truly ashamed of his behaviour.

Consequences of the Offence

Mr. Bird is still experiencing serious physical and economic consequences as a result of this incident. He suffered several injuries as a result of the struggle with the security guard. According to Dr. Snuffleupagus, who was his diagnostic physician on March 19, 2012, he received a 5 cm laceration on his face which required 6 sutures. Post offence, his injuries were still a source of concern and he was sent for a CT scan on March 25, 2012. According to the CT scan report completed by Dr. Snuffleupagus, he continued to suffer vertigo, diplopia (double vision), headaches and vomiting one week after the accident. His jacket was torn as a result of this struggle. Please find a photograph of the injuries and the jacket attached.

In addition to the physical concerns, Mr. Bird has experienced employment and economic consequences. As a result of this incident, he had to take ten days off work, from March 18 to March 28, 2012. Please find a copy of the doctor's note attached. Mr. Bird has since stopped working with Corrections Canada due to the stress of this incident.

Mr. Bird works in the non-profit sector. All jobs available within this field require a criminal record check. If Mr. Bird receives a criminal record as a result of this incident he will likely be unable to find work in his field. Furthermore, he will be obligated to reveal this charge to Sesame Village Neighbourhood House, which is providing him with occasional employment, and he will likely lose this small amount of income. This will have a serious impact on Mr. Bird's ability to provide support for himself and his son.

In addition to everything else, Mr. Bird is being harassed by a law firm in Ontario seeking to collect damages, all of which is increasing his anxiety.

Due to all of the above concerns, we believe there is no public interest in proceeding with this case. We respectfully request that he be accepted for diversion.

Please find the following attached documents:

1. A photo of Mr. Bird's injury.
2. A photo of Mr. Bird's ripped jacket.
3. A copy of the doctor's note requesting Bird be given time off work.
4. A copy of the letter from the law firm that is threatening to sue Mr. Bird on behalf of Oscar's Footwear Emporium.

Mr. Bird is to appear in court on March 13, 2013, at Courtroom 2, Provincial Court, 200 East 23rd St, North Vancouver, BC. I have instructed Mr. Bird to seek a two-week adjournment for the matter to be considered.

Thank you for your consideration of this letter.

Sincerely,

Kermit T. Frog
Law Student
Attachments

F. HOW TO PREPARE FOR AND CONDUCT A NON-CUSTODIAL SENTENCING HEARING AS A LAW STUDENT

1. Determine the available sentence and the appropriate range of sentence. Review sections 720-729 of the *Criminal Code* and, in particular, section 718.
2. Determine the Crown's position on sentence – consider whether:
   a. There is anything the accused could demonstrate to cause the Crown to soften its position; and / or
   b. A delay of the hearing would be advantageous to the accused.
3. Consider any mitigating or aggravating factors. The following are some mitigating factors:
   - Early plea of guilt;
   - Pre-trial custody attributed to this offence;
   - Restrictions placed upon the client pursuant to the release (bail) order; and
   - Loss of employment or loss of license (if there was a driving offence) or other events which have caused hardship to the accused.
4. Consider the facts of the offence as it relates to our client:
   - The accused person's role in the offence (i.e., follower or under the influence of others);
   - Offence was the result of a spontaneous event;
   - Incident was an isolated occurrence;
   - Absence of property loss;
   - Absence of injuries or full recovery from injuries;
   - Motive (i.e., for property offences, the items obtained were necessities);
   - Previous and/or subsequent positive relationship with the victim;
   - Accused person's state of mind at the time of offence;
   - Mental illness short of not criminally responsible;
   - Alcohol or drug involvement, particularly if addiction present;
   - Accused person's limited or diminished intelligence or emotional instability; and
   - Any changes made by the accused such as counselling or other treatment.
5. Collect reference letters or letters of employment. Make 2 copies of each **and confirm with the writers of the letter that the letters are authentic**. **The letters must state that the writer is aware of the criminal charges.**

<u>Procedure (after the Crown has made submissions)</u>

1. Tell the judge what the defence is seeking in terms of a sentence.
2. Tell the judge whether the defence is in agreement with the Crown's sentencing position in terms of the sentence, the length, and conditions.
3. If the defence is not in complete agreement with the Crown position tell the judge:
   a. Which additional facts are relevant to the client; and
   b. Which portions of the Crown sentencing position are in dispute (such as the sentence, length & conditions). Note: Formal fact disputes are to be made through s. 721 of the *Criminal Code*.
4. Briefly review the accused person's background.
5. Briefly discuss the effect of the crime on the accused and the changes made as a result.
6. Review why some of the conditions sought by Crown may not be necessary.
7. Tell the judge that the accused is extremely remorseful and embarrassed by the incident (if you have instructions from the client to say that).

   Review what the defence is seeking and why it satisfies the principles of sentencing as set out in section 718 of the *Criminal Code*.

<u>Sentencing Submissions Script for Law Students</u>

1. Crown calls the case.
2. Introduce oneself– go up to the counsel table (and motion for the accused to stand beside you) – "Your Honour, my name is Jane Doe, last name spelt D-O-E. I am a law student and with the court's leave I represent John Smith, who is present before the court." – Get the accused to stand up from where they are seated. If they are in the gallery get them to cross the bar to stand beside the counsel's seat.

   Explain why the defence is here – "Your Honour, this matter is before the Court today for guilty plea and sentencing on counts 2 and 3 of the information, and we are ready to proceed".

   Waive the Formal Reading of the Information - "Your honour we waive the formal reading of the information".

   Continue on and say, "and Mr. Smith wishes to enter a guilty plea to Counts 2 and 3 of the Information.

   If there are concerns about the accused person's ability to understand the process, the student should instead state, "I ask that the charge be formally read to Mr. Smith".

   The Court will then read the charge to the accused and ask the accused to enter their plea, plus the questions required by s 606(1.1). This should only be done in rare cases where the accused is seriously mentally ill, changing instructions and throwing up red flags and the student need to protect themselves

   in case the client tries to withdraw their guilty plea in the future.

   (The student and the accused can sit down at this point in time). Crown will read in the facts, state Crown's sentencing position and make submissions as to why their position is fit and appropriate in the circumstances.

   Defence submissions – The student should stand when making submissions and the accused can remain seated. It depends on one's style, and each case and each submission is different, but they should have the following contents and in approximately this order:

   a) Defence sentencing position – tell the judge right away what the defence wants.
   b) Facts – Does defence have a different take on the facts of the offence. Is there further information or facts you wish to submit? Note: actual facts disputes are to be made through s. 721 of the *Criminal Code*, not here.
   c) Circumstances of the accused – the student should tell the judge everything that is on the background questionnaire.
   d) Go through the defence's proposed conditions and why. Link the condition you are proposing back to a specific principle of sentencing.
   e) Summarize and conclude and tell the judge again what you are asking for and why.

   Please review the section of the Guide to Criminal Defence Work with respect to court etiquette and guilty plea-sentencing.

G. TRIAL BOOKS

TRIAL BINDER

TAB

1. **Information**
   Charging documents

2. **Report to Crown Counsel**
   Particulars, Report to Crown Counsel Summary/Synopsis

3. **Police Witness Statements**
   (Separate each witness with a coloured sheet and/or post it note)
   Include Police Statements & Police notes together

4. **Civilian Witness Statements**
   (Separate each witness with a coloured sheet and/or post it note)
   Include all statements, notes, 911 recordings etc. for each witness together

5. **Submissions/Closing Arguments**

6. **Case Law**
   (3 copies of each case)
   1 for you, Crown & Judge

7. **Sentencing Submission**

   Always be prepared to speak to sentence in case the accused in found guilty

   -Use background interview sheet for client information
   -instructions in the fishroom (criminal corner box)

8. **Draft Cross Examination notes of each Crown witness**

   Draft Direct Examination notes of each DefenceWitness
   (Separate each witness with a coloured sheet and/or post it note)

You should have a separate binder or notebook to makes notes of the evidence during trial. Make a 2 inch margin on the right of each page. Use the margin to star or highlight areas you will want to return to during your cross-examination

H. GLOSSARY OF TERMS

Absolute Discharge
- An accused pleads guilty or is found guilty but has no conditions or probation period imposed. There will be no conviction on the criminal record.

Accused
- The person whom the Crown charges with a criminal offence.

Actus Reus
- An essential element of the criminal offence; what the accused physically did to commit the crime.

Adjournment
- A postponement; an accused or clinician can ask for this at an appearance if they need more time before deciding what to do about the charge.

Admission
- A statement made by an accused to a civilian witness.

Agent
- An appearance made by a person other than the accused acting on behalf of the accused.

Alternative Measures
- A program offered by Crown to divert the offender away from the criminal justice system. No guilty plea is made and charges are stayed. An acknowledgement of guilty and expression of remorse are required by the client.

Appeal
- Formally contesting the verdict or sentence.

Appearance Notice
- A notice provided by a police officer requiring the accused to attend court at a certain date and time.

Arraignment Hearing
- A hearing in front of a judge or JP where the accused decides whether to plead guilty or go to trial.

Bail
- Refers to the release (or detention) of a person charged with a criminal offence prior to a trial or guilty plea.

Bail Conditions
- Release conditions imposed on an accused that they must abide by in order to be released from custody prior to trial or plea.

Bench Warrant
- A bench warrant is an order issued by a judge requesting the detention of a person until they can appear in court. Such an order is often issued because a defendant did not appear in court.

Complainant
- The person who usually makes the report to the police about having been the victim of a crime.

Conditional Discharge

- A period of probation imposed on an accused where after the period is complete, no convictions will appear on a criminal record.

Conditional Sentence

- A conditional sentence is a jail sentence that you serve in the community instead of jail. Judges will use a conditional sentence only if they are satisfied that you will not be a danger to the community and do not have a history of failing to obey court orders.

Confession

- A statement of guilt made to a police officer or another person in authority.

Cross-Examination

- The interrogation (leading questions) of a witness called by the other side.

Crown Counsel

- Lawyers appointed by the government who prosecute criminal cases.

Custodial Sentence

- A sentence served in jail.

Detention

- A suspension of an individual's liberty by physical or psychological restraint.

Direct Examination

- Where the defence or Crown questions its own witnesses.

Disposition

- If a matter in court is "for disposition," this means there will be a guilty plea instead of a full trial.

Duty Counsel

- Lawyers paid by the government who work in the courthouse and advise accused with basic legal information and basic court appearances.

Election

- For indictable offences, where the accused can decide whether to have their case tried in Provincial Court or Supreme Court (and with or without a jury).

Ex Parte

- Proceeding without the accused present.

Hearsay

- Evidence that is offered by a witness of which they do not have direct knowledge but, rather, their testimony is based on what others have said to them.

Hybrid Offence

- An offence where the Crown can choose to proceed either summarily or by indictment. The majority of *Criminal Code* offences are hybrid.

Judicial Case Manager

- A JP who controls the calendar for the court and sets trial dates.

Justice of the Peace (JP)

- A person appointed by the government to conduct certain tasks in court (like initial appearances), fix trial dates, and hear bail applications.

Indictable Offence

- A more serious criminal offence where the maximum sentence could be life imprisonment. There is no time limit to when charges can be laid (e.g., an accused can be charged 20 years after an act has occurred). The exception to this point is treason, which has a 3-year limitation period.

Information

- The document which sets out the specific offences the accused is charged with.

Initial Appearance(s)

- An appearance before a JP or judge where the accused can decide how to proceed. There can be multiple initial appearances.

Initial Sentencing Position

- The sentence Crown would seek if the accused were to plead guilty and not go to trial.

Insufficient Evidence Motion

- A motion made by defence at trial claiming Crown has not proven the case beyond a reasonable doubt.

K-File

- A file where the accused and complainant are family members. The most common is spousal assault.

Mens Rea

- An essential (mental) element of the criminal offence (an intention to commit the crime).

No Evidence Motion

- When the Crown has presented the case against you, if you feel that they have failed to prove all the things that had to be proved, you can make a no-evidence motion. This means that you are asking the judge to dismiss the case, without hearing the defence evidence.

Particulars

- The disclosure package provided to the accused by the Crown containing all of the relevant evidence in the Crown's case against the accused.

Preliminary Inquiry

- A hearing held in provincial court to determine if there is enough evidence to move forward to the trial in Supreme Court. The Preliminary Inquiry is available to all accused persons charged with offences that proceed by way of indictment. A preliminary inquiry is a hearing to determine whether there is sufficient evidence to proceed to trial. A preliminary inquiry is not a trial.

Pre-Sentence Report

- A report that can be ordered by a judge after a guilty plea has been entered and prior to sentencing in order to recommend an appropriate sentence for the accused.

Report to Crown Counsel

- Summary of the police narrative and any witness statements taken with respect to the case.

Sentence

- What punishment the judge decides the accused should be subject to when found guilty.

Summary Conviction Offence

- A less serious offence where the maximum jail term is usually 6 months and maximum fine is $5,000.

Summons

- A written order by a judge or JP requiring the accused to attend court at a certain date and time.

The Bar of the Court

- The partition in the courtroom between where the lawyers sit and where the general public sits.

Vacating a Warrant

- In order to vacate a bench warrant, the client will need to appear before a judge and apply to be re-released on bail.

Verdict

- After the trial, the judge returns a finding of guilty or not guilty.

Voir Dire

- An in-trial hearing that is considered a separate hearing from the trial itself. It is known as a "trial within a trial" and is designed to determine an issue separate from the procedure or admissibility of evidence.

Witness

- Anyone called to give evidence at a trial.